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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 204

JEWEL W. JORDAN, *Appellant*

v.

STATE OF ARIZONA, EX REL.
GARY K. NELSON
The Attorney General, *Appellee*

On Appeal From the Supreme Court of Arizona

JURISDICTIONAL STATEMENT

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v.

STATE OF ARIZONA, EX REL.
GARY K. NELSON
The Attorney General, *Appellee*

On Appeal From the Supreme Court of Arizona

JURISDICTIONAL STATEMENT

Appellant's appeal from the judgment of the Supreme Court of Arizona, filed on February 6, 1969, which ordered that rehearing on a judgment of December 31, 1968, of the Supreme Court of Arizona, given on an original writ of Quo Warranto be granted and, that the December 31, 1968, judgment be vacated; and that ouster on an original writ of Quo Warranto issue to Jewel W. Jordan, State Auditor of Arizona.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Arizona on rehearing is reported in Ariz. , 450 P.2d 383, a copy of which is attached hereto as Appendix A. The original opinion of the Supreme Court of Arizona, entered on December 31, 1968, is reported at Ariz. , 449 P.2d 18, attached hereto as Appendix B.

JURISDICTION

The Supreme Court of Arizona had original jurisdiction to entertain the writ of Quo Warranto pursuant to Arizona Constitution, Art. 6, Sec. 5, Par. 1, and A.R.S. Sec. 12-2041. The Court's judgment on rehearing was entered February 6, 1969, which judgment vacated the prior judgment of the Supreme Court of Arizona of December 31, 1968. Notice of Appeal was filed in the Supreme Court of Arizona, May 7, 1969, and the record has been duly forwarded to this Court by the Clerk of the Supreme Court of Arizona. This Court has jurisdiction to review this appeal by virtue of 28 U.S.C. Sec. 1257 (2), *Largent* v. *State of Texas,* 318 U.S. 418, 63 S. Ct. 667, 92 L. ed. 402 (1943). *Lawrence* v. *State Tax Commission of Mississippi,* 286 U.S. 276, 52 S. Ct. 556, 76 L. ed. 1102 (1932). The state statute involved is a rule of the Supreme Court of Arizona granting rehearing on an original writ of Quo Warranto, enunciated for the first time in the judgment on rehearing of February 6, 1969, which rehearing was allowed in the absence of any constitutional or statutory authority, or prior enunciated rule.

QUESTIONS TO BE PRESENTED

1. Whether the right to hold a state office is a substantial enough interest that it has the protection of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. Does the creation of a rule allowing rehearing on a fully executed judgment in an original Quo Warranto proceeding, result in a rule which denies due process, as protected by the Fourteenth Amendment to the Constitution of the United States, when the rule was created in the opinion on judgment which also settled the right of appellant?

3. Is a rule of court, granting rehearing in an original proceeding of Quo Warranto, "void for vagueness" and therefore a denial of due process when the rule is unstated?

4. Was the action of the Supreme Court of Arizona so arbitrary and unreasonable that it was a denial of rights, privileges and immunities accorded by the Fourteenth Amendment to the Constitution of the United States, when the only change occurring between the time of original judgment and the judgment on rehearing was a change in composition of the bench?

STATEMENT OF THE CASE

On February 6, 1969, the Supreme Court of Arizona, in a single act: (1) granted a rehearing on the fully executed judgment of December 31, 1968, which had been given on a writ of Quo Warranto; (2) vacated that executed judgment; and, (3) rendered a new judgment reversing its earlier position and ousting appellant as State Auditor of Arizona. All this was done even though no procedure allowed rehearing in an origi-

nal Quo Warranto proceedings. The only fact which had changed is that one member of the majority in the first opinion, who had been defeated in election, was replaced by a man of the opposite party. The new Justice voted with the two man minority from the first opinion to fabricate a rule granting rehearing so that appellant's office could be taken from her.

The facts which led up to this are as follows. The appellant is State Auditor of Arizona. She first entered that office by election in 1950. She was subsequently re-elected in 1952, 1954, 1956, 1958, 1960, 1962, 1964, 1966 and 1968. In 1968 she received 275,964 votes. On the 28th of November, 1968, she received her Certificate of Election signed by the Secretary of State.

On February 26, 1968, the Arizona House of Representatives passed House Concurrent Resolution 1 (HCR 1) entitled, "PROPOSING AN AMENDMENT OF THE CONSTITUTION OF ARIZONA ABOLISHING THE OFFICE OF STATE AUDITOR, AND AMENDING SECTIONS 1, 6 AND 9 OF ARTICLE 5, CONSTITUTION OF ARIZONA", by a vote of 31 ayes, 22 nays, 7 not voting. On March 1, 1968, the Arizona State Senate passed the same resolution by a vote of 17 ayes, 12 nays, 1 not voting. The text appears in Ariz. , 449 P.2d 18, 19 (1968). The measure was approved by the Governor on March 13, 1968, and filed in the office of the Secretary of State the same day. It became Proposition 108.

On March 21, 1968, eight days after HCR 1 had been passed, approved and filed, Senate Concurrent Resolution 6, entitled, "PROPOSING AN AMENDMENT OF THE CONSTITUTION OF ARIZONA RELATING TO THE EXECUTIVE DEPARTMENT; PROVIDING FOR FOUR YEAR TERMS FOR THE GOVERNOR, SECRETARY OF STATE, STATE AUDITOR, STATE TREASURER, ATTORNEY GENERAL AND

SUPERINTENDENT OF PUBLIC INSTRUCTION, AND AMENDING ARTICLE 5, SECTION 1, CONSTITUTION OF ARIZONA", was passed by the state Senate 16 ayes, 11 nays, 3 not voting. That same day the House passed the resolution 33 ayes, 16 nays, 11 not voting, and the measure was filed in the office of the Secretary of State. It was denominated Proposition 104. It was printed in the statutory publicity pamphlet, as was Proposition 108. Jewel Jordan, as candidate for State Auditor, and both propositions, were on the ballot November 5, 1968. Proposition 104, retaining the office, received 266,035 "Yes" votes to 129,991 "No" votes; Proposition 108, abolishing the office received 206,432 "Yes" to 171,474 "No"; and Jewel Jordan received 275,964, running unopposed, the second highest vote among all the candidates running for state office.

On December 5, 1968, the State of Arizona, on the relation of the Attorney General, brought a writ of Quo Warranto in the Supreme Court of Arizona under that court's original jurisdiction of extraordinary writs claiming that the office of State Auditor had been abolished by a vote of the people and asking that Mrs. Jordan be ousted.

> Arizona Constitution, Art. 6, Sec. 5, Par. 1, Arizona Revised Statutes (A.R.S.) Sec. 12-2041, A.R.S. Sec. 12-2045.

The Supreme Court of Arizona has the power to make procedural rules. Arizona Constitution, Art. 6, Sec. 5, Par. 5. Pursuant to that power, the Supreme Court of Arizona has enacted rules governing matters before it. Rules of the Supreme Court, 17 A.R.S. These rules are divided into six parts, three of which deal with types of cases before the Court: I. Writs under original jurisdiction; II. Civil appeals; III.

Criminal appeals. The rules of Part I were used in bringing this action.

Mrs. Jordan replied to the application on December 6, 1968, pointing out that the terms of Propositions 104 and 108 irreconcilably conflicted, since Proposition 108 abolished the office of State Auditor and Proposition 104 secured for the office a four year term beginning in 1971. The reply cited the Constitution of Arizona, Art. 4, Part 1, Sec. 1, Par. 12, which says:

> "If two or more conflicting measures or amendments to the Constitution shall be approved by the people at the same election, the measure or amendment receiving the greatest number of affirmative votes shall prevail in all particulars as to which there is conflict."

Therefore, she argued, the conflict should be resolved in favor of retaining the office since the vote on Proposition 104 had exceeded the vote on Proposition 108 by 59,603 votes.

The Supreme Court of Arizona heard argument on the 10th of December, 1968, and thereafter by a 3-2 vote rendered its opinion December 31, 1968 Ariz. , 449 P.2d 18 (1968). The majority opinion was authored by then Chief Justice Ernest W. McFarland and concurred in by Justices Bernstein and Lockwood.

That opinion held that there was an irreconcilable conflict between Propositions 104 and 108 in regard to the existence of the office of State Auditor, and that since Proposition 104, which provided for certain state officers including State Auditor, and for four year terms, prevailed by the greatest number of votes, that the Constitution of Arizona, Art. 4, Part 1, Sec. 1, Par. 12 applied, and Mrs. Jordan was entitled to her office.

In the course of the opinion, Chief Justice McFarland cited the Constitution of Arizona, Art. 21, MODE OF AMENDING, in particular the last sentence, which provides:

> "If more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately."

The opinion demonstrated that no guidance is provided for the form that a constitutional amendment must take, but that the legislature apparently used the form required by the constitution for legislative acts. Arizona Constitution, Art. 4, Pt. 2, Sec. 14. This form is nowhere required for constitutional amendments. The opinion also points out that the problem of poor drafting could have been solved in several ways.

The Court could also have noted that this was not the only occasion that the legislature created this kind of conflict. Propositions 100, 101 and 102 were constitutional amendments proposed by resolution of the 28th Arizona Legislature and passed by the people at the 1968 election. All three propositions were intended to amend the same section of the constitution, *viz.* Article 9, Section 2. Proposition 100 changed veterans tax exemptions. Proposition 101 changed widow's tax exemptions. Proposition 102 allowed an exemption for household goods. Each proposition restated the old language of the section plus the change. In effect, each re-enacted what the other changed. All three passed by varying margins.

The same legislature passed A. R. S. Sections 4-112, 5-106, 26-102, 28-205, 32-2106, 46-134 and 46-207. It

was necessary for the legislature to re-enact these statutes in 1969 to clear up this same kind of conflict. However, the legislature does not have the power to clear up those conflicts it created in the constitutional provisions. Article 4, Part 1, Section 1, Paragraph 12 of the Constitution is the only provision for doing that. Since Proposition 104 passed the legislature nine days after Proposition 108, the legislature knew it had already handled the measure to eliminate the Auditor. It therefore should have known that putting an unconditional reference to the Auditor in the later measure would cause confusion.

The legislature had a good deal of trouble with drafting in 1967 and 1968. These measures should have been submitted with the old language conditional on passage or failure of the amendments. In some of the statutes, this drafting problem obscured the purposes and in some it did not, but the corrections had to be made regardless of the purpose or intent with which the legislature acted.

The dissent in the December 31, 1968, opinion was authored by Justice Fred C. Struckmeyer, Jr. and concurred in by Justice Jesse Udall.

The opinion argued that even though the Constitution of Arizona, Article 5, Section 1, which was the provision being amended, contained just one sentence in the part with which the court was concerned, that sentence was divisible into two separate clauses and that by taking one clause from one proposition, and adding one clause from the other proposition, both propositions could be made valid.

Justice Struckmeyer would ignore the two leftover clauses which were also before the people at the same election.

The dissent cites and discusses *Kerby* v. *Luhrs,* 44 Ariz. 208, 36 P.2d 549 (1934), which interprets the language of Article 21 quoted above to show that two clauses had to be submitted separately to the electorate.

We believe, using Justice Struckmeyer's own argument, that the Court could reasonably have struck down both propositions as violative of Article 21 since both clauses were presented to the people in both propositions.

The dissent discusses intention or purpose at some length. It is the intention of the *lawmaker* that should interest the court. The lawmaker was not the legislature. The lawmaker was the people of Arizona, Arizona Constitution, Art. 4, Part 1, Sec. 1, Par. 13. The legislature was the drafter.

Who can say what the intention of the people was in this case? With intention, 275,964 voted for Mrs. Jordan. That vote could signify an intention that they wanted her more than they wanted either proposition. One could hypothesize any number of combinations of votes by individuals for Mrs. Jordan and against either or both propositions.

The differences between new material and old in the amendments, so obvious to Justice Struckmeyer, were presented to the voters as part of a ballot that contained 12 such propositions plus all the candidates for national, state, legislative and county offices. The time allowed to vote was two minutes. A.R.S. Sec. 16-805.

The will of the majority is not clear. The largest majority re-elected Mrs. Jordan. The next largest majority enacted a provision for four year terms which included the State Auditor. The lowest vote was for abolition of the office. It is a matter of common knowl-

edge that much time is spent after an election to determine what any vote really meant. In the face of this kind of confusion, the minority in the original opinion would merely opt for their favorite guess on meaning without any evidence to support that guess and ignore the specific constitutional provision which dictated how this conflict was to be settled.

The above discussion is presented, not to indicate that this Court should decide that question, but to show that there were two hotly argued points of view on construction of the constitutional amendments. There were probably other ways this situation could have been construed.

We concede that had the views of Justices Struckmeyer and Udall prevailed at this point the decision would have been final and no federal question would have been raised by these facts or by the law. The case would have been settled on a state question.

The judgment on a writ of Quo Warranto was self-executing. *Foster* v. *State ex rel. Johnston,* 112 U.S. 201, 5 S. Ct. 8, 28 L. ed. 629 (1884); *State* v. *Chapman,* 187 Wash. 327, 60 P.2d 245 (1936); *State ex rel. Jones* v. *Wise,* 39 Del. 409, 200 Atl. 418 (1938); 44 Am. Jur., *Quo Warranto;* Sec. 124, 125; 74 C.J.S., *Quo Warranto,* Sec. 50(c), p. 276. No order was needed to have Mrs. Jordan continue in the office since she had been exercising that office continually. Therefore, when the first decision was filed, the jurisdiction of the Supreme Court of Arizona was completed and it ceased to have the case under its control.

Mrs. Jordan filed her Oath and Bond as required by statute and on January 6, 1969, she entered upon her new term.

Also on January 6, 1969, Justice Bernstein, a Democrat, and a concurring member of the original majority, who had been defeated by Jack D. H. Hays, a Republican, left the bench and his seat was taken by Justice Hays.

On January 9, 1969, the Attorney General filed a motion styled as Motion For Rehearing, Review And Or Revision (Appendix C), citing Rule 9, Rules of the Supreme Court, 17 A.R.S. This is the rule which applies to civil appeals. It is in a distinct section apart from rules applying to writs.

Rule 1, Rules of the Supreme Court, under which the Attorney General applied for the writ, has no provision for rehearing of extraordinary writs.

Both the styling of the motion and the reference to the wrong rule indicate that the Attorney General was also bothered by his attempt to get further action in the face of no existing procedure.

Note that Rule 15, Rules of the Supreme Court, provides:

> 15. Rules Governing Criminal Appeals
>
> "The Rules of this court pertaining to civil appeals and not conflicting with Rules specifically pertaining to appeals in criminal actions, when appliable and insofar as they are practicable, shall govern appeals in criminal actions."

The article on writs has no similar provision nor does the rule on appeals apply, for an original writ is not an appeal. In fact, this is obvious on the face of Rule 9 by its explicit reference to Rule 8, which governs remand to the lower court.

The Attorney General argued that, since Propositions 100, 101 and 102 had similar conflicts, confusion

would result and should be avoided. His argument is really that error in one situation should be allowed because, when it became precedent, other errors of the same type would not have to be recognized. If this novel theory were accepted, many of the far-reaching decisions of this Court could have been avoided.

On January 17, 1969, appellant filed her Objection To Motion For Rehearing. (Appendix D) That motion objected that there was no procedure for rehearing on original writs. The Objection also notes that the argument on intent was fully explored in the December 31, 1968, majority and dissenting opinions. The Objection also pointed out that conflict between Proposition 100, 101 and 102 was not germane to this question and that those propositions would have to stand on their own merits, if and when they were presented to a court. The Attorney General failed to introduce any new facts or law to support his petition for rehearing.

On January 23, 1969, Mrs. Jordan filed her Supplemental Objection to Motion for Rehearing (Appendix E) wherein she raised the federal questions as follows:

> "* * *
>
> "THEREFORE, should this Court grant the motion of the Attorney General, it would be a procedure not authorized by the respondent's rights, without due process, in violation of the Fourteenth Amendment to the United States Constitution and under Article 2, Section 4 of the Constitution of the State of Arizona.
>
> "Any decision on the merits of this case other than the existing one filed by this Court would give rise to a Federal question that the respondent was deprived of her office by an arbitrary application of a state Constitutional Amendment in the face of another Amendment which preserved that office to her."

Since no stated procedure existed, there was no way to determine the proper time to raise the federal question. However, since the court allowed the Supplemental Objection to be filed and no protest was made, it was timely. A federal question did not arise until that time.

No further action of any kind occurred until the court, on February 6, 1969, granted rehearing, vacated the first judgment and reversed.

Justice Hays participated in that decision even though he had not participated in any consideration before January 6, 1969, and had heard no oral argument.

Justice Struckmeyer, author of the original dissent, wrote the opinion for the new majority in a 3-2 decision. Justice Udall, who had been with Justice Struckmeyer in original dissent, joined him as did Justice Hays.

The judgment was final and included an order of ouster. The following day, February 7, 1969, another Order of Ouster was made and served.

Notice of Appeal was filed in the Supreme Court of Arizona on May 7, 1969.

On May 7, 1969, Application For Extension Of Time Within Which To File A Petition For A Writ Of Certiorari And Docket An Appeal was filed in this Court.

The application for extension was granted the 8th day of May, 1969.

The record was certified May 27, 1969.

THE QUESTIONS ARE SUBSTANTIAL

1. The underlying question is whether the right to hold a state office is a substantial enough interest that it has the protection of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

On its face, *Snowden* v. *Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L. ed. 497 (1943), would seem to answer that question with a resounding "No", but in *Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L. ed. 2d 663 (1962), Mr. Justice Brennan, for the majority, reviewed the cases underlying the *Snowden* decision and indicated that the United States Supreme Court would have jurisdiction over this subject matter. The opinion also indicated that with the proper facts there would be a justiciable question that the court could consider. On this question, the *Snowden* and *Baker* cases therefore conflict on their face. Admittedly, the question of the nature of the right to hold office was not the subject of *Baker.* Rather, the question was the extent of the Court's jurisdiction in so-called "political areas". Although the present situation is not within the holding in the *Baker* case, it can be viewed as within the doctrine arising from that case.

This has led to confusion. In *Bacon* v. *Holzman,* 264 F. Supp. 120 (N.D. Ill., 1967) a federal district court noted the conflict between the *Snowden* and *Baker* cases, but since the *Snowden* case had not been squarely overruled, it was adhered to and jurisdiction was refused, while at the same time it was noted that the drift was toward the position of *Baker.*

Since *Baker,* two other federal cases have treated this problem without mentioning *Baker. Bynum* v. *Burns,* 379 F.2d 229 (8th Cir., 1967); *Gentry* v. *How-*

ard, 288 F. Supp. 495 (E.D. Tenn. 1968). Those cases applied *Snowden* or *Taylor & Marshall* v. *Beckman,* 178 U.S. 548, 20 S.Ct. 890, 44 L. ed. 1187 (1900), and refused jurisdiction. Since *Baker,* a state court has done the same without noting the conflict. *Coffelt* v. *Bryant,* 238 Ark. 363, 381 SW 2d 731 (1964). However, *Birnbaum* v. *Trussell,* 371 F.2d 672 (2nd Cir., 1966) shows that a way can be found.

In recent years the court has treated problems of state officers without resolving the nature of the right to office. *Bond* v. *Floyd,* 385 U.S. 116, 87 S.Ct. 339, 17 L. ed. 2d 235 (1966); *Baggett* v. *Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L. ed. 2d 377 (1964). Discrimination based on race or sex, since it involves stated policy of the Constitution, is grounds for protecting the right to office. U.S. Constitution, Fifteenth Amendment, Nineteenth Amendment.

In voter rights cases, it has been recognized that protection extends beyond stated policy to forbid geographical or economic discrimination. *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L. ed. 2d 506 (1964). Since voter rights are the font from which the right to hold office flows, it follows from *Reynolds* that other than the stated types of denials of due process will be considered. Otherwise, the court is faced with the incongruous position that the right of a black or a woman, to hold office is protectible, but the rights of all others are not. Were that the case, we should have alleged discrimination in this case because appellant is a woman.

We believe that the right to hold office is fundamental to our entire system of government. The way to prevent any system from being oppressive is to inject hope into the mind of each man that he may participate

not only in the choice of who governs, but also that he has the chance to take part in the governing himself.

The cases underlying the *Snowden* decision are distinguished in *Baker*. *Kennard* v. *Louisiana ex rel. Morgan,* 92 U.S. 480, 23 L. ed. 478 (1875), and *Foster* v. *Kansas ex rel. Johnston,* 112 U.S. 201, 5 S.Ct. 8, 97, 28 L. ed. 629, 696 (1884), were decided in the period immeidately following enactment of the Fourteenth Amendment. Those cases decided, on the merits, due process questions relating to the right to hold state office. In *Baker,* Mr. Justice Brennan pointed out that in *Taylor* due process was decided on the merits. The question of applying the Fourteenth Amendment to state officers has never been without controversy. See dissenting opinions of Mr. Justice Harlan in *Taylor* and of Mr. Justice Douglas in *Snowden.* See also the concurring opinion of Mr. Justice Brewer in *Taylor.*

It would seem proper to review *Snowden* in the light of the weakness of its antecedents and the inconsistency with more recent voting rights and loyalty oath cases.

We do not think this question should turn on how the state views the nature of the right, although it would seem protectible in Arizona under the language of Justice Struckmeyer in *Hatfield* v. *Arizona Highway Patrol Merit System Council,* 97 Ariz. 24, 396 P.2d 256 (1964). Other states view the right as protectible. *Hanchey* v. *State,* 52 So.2d 429 (Fla., 1951); *Hamilton* v. *Brennan,* 203 Misc. 536, 119 N.Y.S.2d 83 (1953).

Tennessee is a good example of the problems caused. In *Joyner* v. *Browning,* 30 F. Supp. 512 (W.D. Tenn. 1939), the District Court recognized the Tennessee state rule that a property right existed in a public office. However, in *Gentry, supra,* the District Court

applied *Snowden*. This distinction, based on state position, could lead too easily to statements of the nature of the right, so that particular states could avoid Fourteenth Amendment protections. We ask the Court to rule that the right to hold office is protectible under the due process clause of the Fourteenth Amendment.

2. Does the creation of a rule allowing rehearing on a fully executed judgment in an original Quo Warranto proceeding result in a rule which denies due process, as protected by the Fourteenth Amendment, when the rule was created in an opinion on judgment which also settled the right of appellant?

We agree that the Supreme Court of Arizona has the power to make rules of procedure. Arizona Constitution, Art. 6, Sec. 5, Par. 5; A.R.S. Sec. 12-109. This rule-making power is also inherent in the court. *Arizona Podiatry Association* v. *Director of Insurance,* 101 Ariz. 544, 422 P.2d 108 (1966). The rule is a statute, *Lathrop* v. *Donohue,* 367 U.S. 820, 81 S.Ct. 1826, 6 L. ed. 2d 1191 (1961); *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L. ed. 2d 1127 (1961).

Arizona has recognized that notice and an opportunity to be heard are necessary parts of a proper rule-making process. A.R.S. Sec. 12-109, 12-110.

A.R.S. Sec. 12-109 provides in part:

> "B. The supreme court shall print and distribute the rules to all members of the state bar and to all other persons who apply.
>
> "C. The rules shall not become effective until sixty days after distribution."

A.R.S. Sec. 12-110 provides:

> "A. The state bar, or a representative group selected by the bar, shall act as an advisory board and shall either voluntarily or upon request of a majority of the judges of the supreme court, consult with, recommend to or advise the court on any matter dealt with or proposed to be dealt with in the rules.
>
> "B. Any member of the state bar or a private citizen may object in writing to a rule or a part thereof and may request changes. The court shall consider the objections and requests as advice and information only and may act thereon at its discretion."

It is also recognized that a rule must be prospective. A.R.S. Sec. 12-109(C). See also, 110 A.L.R. 54.

These provisions were not complied with in this case. The Arizona court granted rehearing while recognizing there was no prior rule.

> "Respondent objects to petitioner's motion for rehearing urging that there is no procedure for reconsideration of a decision where this court exercises its original jurisdiction pursuant to Art. 6, Sec. 5, Par. 1, Constitution of Arizona, A.R.S. It is true that Rule 1 of the Rules of the Supreme Court, 17 A.R.S. only sets forth the procedure for filing and hearing applications invoking our original jurisdiction. *It does not set forth a procedure for rehearing, but, we note, neither does the rule expressly prohibit a rehearing.*" — Ariz. —, 450 P.2d 383, 384 (1969). (Emphasis supplied)

After making this statement, the court then reviewed a series of Arizona cases which have to do with rehearing civil appeals for which there are rules, and cases in which the action of the court was not fully executed

and therefore still under the court's control, or cases with radical changes in facts or law.

We believe that the act of the court created a rule granting rehearing even though such a rule is not clearly stated.

There is no question that a party may now apply for rehearing using this case as precedent.

The effect is clearly to fill in the void in existing rules on writs. As previously stated, such a rule is within the power of the court if properly done. But this rule was created unannounced and without precision.

> "The want of due process of law may arise from the fact that the law attempted to be enforced is void or that the forms of law have not been observed." 16A C.J.S. *Const. Law* Sec. 569(1), p. 565. See also *Cook* v. *Parkinson,* 191 Okla. 529, 131 P.2d 82 (1942).

The rule of the court granting rehearing was void. Use of such a rule was a denial of due process and repugnant to the Fourteenth Amendment.

The danger of this situation is apparent. With the power to make "on the spot" procedural rules, the Arizona court could defeat the substantive right of any party by making rules to halt or continue proceedings until the matter came out the way they wanted.

3. Is a rule of court, granting rehearing in an original proceeding of Quo Warranto, "void for vagueness" and therefore a denial of due process when the rule is unstated?

The Arizona court granted rehearing while recognizing that there was no prior rule either way. However, no statement was made as to the contents of the rule.

Mrs. Jordan did not know the form of presentation, the time allowed, how objections were to be entered, whether oral argument would be heard, what grounds were needed, including whether an allegation of substantial change in facts or law would be the only grounds allowed, whether bonds would be required, and what the rights of parties would be during pendency. With all these questions open, parties in any original writ can now apply for rehearing, using the decision of the Arizona court for authority. They will, however, be faced with the same difficulties with which Mrs. Jordan had to contend in responding.

Since appellant had all these questions unanswered while trying to object to the procedure, the rule should be declared void as a denial of due process. *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 86 S.Ct. 581, 15 L. ed. 2d 447 (1966); *Baggett* v. *Bullitt, supra.*

4. Was the action of the Supreme Court of Arizona so arbitrary and unreasonable that it was a denial of rights, privileges and immunities accorded by the Fourteenth Amendment to the Constitution of the United States when the only change occurring between the time of original judgment and the judgment on rehearing was a change in composition of the bench?

As we have tried to show in the Statement of the Case, the original decision of the Arizona court was a reasonable construction of a "knotty" problem. The court made its decision after full and heated discussion in hearing.

The court on rehearing had a new member who created the new majority. That new member had not participated in the hearings or conferences that led up to the first decision. This problem, of change in

composition of a court, has been considered by several courts who have concluded that particularly where there is a closely divided court and the result could be changed solely by participation of a new member, such participation should not be allowed.

> ". . . if a reargument were now allowed, and the former decision reversed, this result would follow, not from a conviction upon the part of the members of the court by which the case was originally heard and determined that the decision was erroneous, nor from the consideration of reasons and arguments not before advanced and considered, but solely from the change in the composition of the court.
>
> "Under such circumstances, a relaxation of the ordinary rules governing applications for reargument would seem to be peculiarly ill-timed.
>
> "It would, in our opinion, be a violation of properties in the administration of justice which it is the duty of a court to maintain, and would tend to destroy that respect for and confidence in judicial tribunals, the loss of which every good citizen would deplore." *Woodbury* v. *Dorman,* 15 Minn. 341, (Gil. 274) (1870).

See also *Brown* v. *Aspden,* 14 How. (U.S.) 25, 14 L. ed. 311 (1852); *Ambler* v. *Whipple,* 23 Wall. (U.S.) 278, 23 L. ed. 127 (1875); *Gas Products Co.* v. *Rankin,* 63 Mont. 372, 207 Pac. 993, 24 ALR 294 (1922); *Flaska* v. *State,* 51 N.M. 13, 177 P.2d 174 (1946); *Cordner* v. *Cordner,* 91 Utah 474, 64 P.2d 828 (1937).

The problem anticipated by those courts happened here. The Attorney General presented a "rehash" of earlier arguments with no facts or law, and then took advantage of the change in the court to get a rehearing

and a reversal in spite of the ruling by the Arizona court.

> ". . . . It is not the office or purpose of a rehearing to reopen the whole cause, and to require of the court a reconsideration of the whole case. Where this precedent to be established, it would open the doors for petitions for rehearing of all causes, and we should expect them more particularly when the persons who compose the court have been changed." *Copper Queen Mining Co.* v. *Arizona Prince Copper Co.*, 2 Ariz. 169, 11 Pac. 396 (1886), *app. dismissed* 127 U.S. 782, 32 L. ed. 331 (1888).

Both the Attorney General and the Arizona court were aware of a lack of procedure which would allow them to make use of the change in composition of the court, because the Attorney General had previously made the following argument before that court in *State* v. *Bohannan*, 101 Ariz. 520, 421 P.2d 877 (1967), *app. dismissed*, 389 U.S. 1, 88 S.Ct. 55, 19 L. ed. 2d 1 (1967):

> "THE MOTION FOR REHEARING IS NOT PROPER"
>
> "The provisions relative to rehearing matters decided by this Court are contained in the sections relating to civil appeals and criminal appeals. There is no provision under Rules 1 and 2 governing writs, providing a rehearing before this Court when a writ has been issued. It is elementary that a motion for rehearing is not a substantial part of any matter before this Court. It is purely a statutory grant, and there is no constitutional or logical mandate requiring that rehearings be allowed. This Court has heretofore indicated that the decision of December 21, 1966, was the writ of the Court and that no further mandate was necessary. Since the mandate or decision of the Court has been rendered, it would appear that a motion for rehearing now could accomplish nothing. See for

> example, the provisions under Rule 14 relating to the issuance of mandates in appeals. It is, therefore, our belief that this Court should summarily dismiss the petitions for rehearing on the grounds that it does not lie within the provisions of the rules of this Court." /

Such difference in treatment to get the result desired smacks of denial of equal protection of the law, as denial of privileges and immunities, and as denial of due process of law under the Fourteenth Amendment.

> "Due process of law protects against arbitrary action, consequently, arbitrary action by the tribunal in the hearing of a cause or in its order violates due process." 16 Am.Jur. 2d, *Const. Law*, Sec. 575, p. 980.

Justice Struckmeyer, authoring the opinion in *Bennett* v. *Arizona State Board of Public Welfare*, 95 Ariz. 170, 388 P.2d 166 (1964) said:

> "... Article II, Sec. 4 of the Arizona Constitution provides:
>
> > 'No person shall be deprived of life, liberty, or property without due process of law.'
>
> "This section is the corollary to the first clause of the 14th Amendment of the United States Constitution. *Its purpose is to preserve personal and property rights against arbitrary action of public officials.*" (Emphasis supplied)

We submit that the actions of the Supreme Court of Arizona and the Attorney General were so arbitrary as to deny the rights, privileges and immunities of Mrs. Jordan guaranteed to her by the Fourteenth Amendment.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted in this cause.

Respectfully submitted,

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June, 1969

APPENDICES

A. Opinion of Supreme Court of Arizona Dated February 6, 1969.

B. Opinion of Supreme Court of Arizona Dated December 31, 1968.

C. Motion for Rehearing, Review and/or Revision Dated January 9, 1969.

D. Objections to Motion for Rehearing, Dated January 17, 1969.

E. Supplemental Objection to Motion for Rehearing Dated January 23, 1969.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

No. 9480

STATE OF ARIZONA, *ex rel*, THE ATTORNEY GENERAL, GARY K. NELSON, *Petitioner*

v.

JEWEL W. JORDAN, *Respondent.*

Original Proceeding in Quo Warranto
On Rehearing

Judgment for Petitioner

GARY K. NELSON, Phoenix
The Attorney General
Attorney for Petitioner

R. G. LANGMADE, Phoenix
Attorney for Respondent

STRUCKMEYER, Justice.

This original proceeding in quo warranto was brought by the State of Arizona, out of the relationship of Gary K. Nelson, the Attorney General, to test the right of Jewel W. Jordan to hold the office of State Auditor. On December 31, 1968, this court entered judgment that respondent legally held an existing office, that of State Auditor. On January 9, 1969, petitioner filed a motion for rehearing asking for a reconsideration of the State's position on the merits. Rehearing granted and Judgment of December 31, 1968, vacated.

Respondent objects to petitioner's motion for rehearing urging that there is no procedure for reconsideration of a

decision where this court exercises its original jurisdiction pursuant to Art. 6, § 5, ¶1, Constitution of Arizona. It is true that Rule I of the Rules of the Supreme Court, 17 A.R.S. only sets forth the procedure for filing and hearing applications invoking our original jurisdiction. It does not set forth a procedure for a rehearing, but, we note, neither does the rule expressly prohibit a rehearing.

We are reluctant on principle to subscribe to the notion that the court does not have the right or power to reconsider decisions found to be manifestly in error. Such was our view in Lindus v. Northern Insurance Company of New York, 103 Ariz. 160, 438 P.2d 311. There, on a motion for rehearing of a denial of a motion for review we recalled the mandate and accepted review, although there was no rule providing for reconsideration. We said:

> "It would be absurd to argue that a court, empowered to correct errors in every other court in this state cannot correct its own. Ariz. Const. Art. 6, § 5, A.R.S. To hold otherwise would create the astounding concept that mistakes made by the Supreme Court of Arizona are the only errors for which no relief is available." 103 Ariz. at 313.

There is precedent for this application for rehearing. In the past on an original application for prohibition under the same Article and Section, Art. 6, § 5, we granted a motion for rehearing as a matter of course and without discussion. State v. Superior Court of Maricopa County, 93 Ariz. 149, 379 P.2d 133, on Rehearing 93 Ariz. 351, 380 P.2d 1009. In Lane v. Mathews, 75 Ariz. 1, 251 P.2d 303, although there was no rule providing therefore, this court granted a second rehearing stating that it was under the inherent power of the court to correct its judgments. And see Arizona Com. Min. Co. v. Iron Cap C. Co., 29 Ariz. 23, 239 Pac. 290. We note also that in Utah, a State with a constitutional provision similar to Arizona's Art. 6, § 5, its Supreme Court accepted rehearing on an original application in quo warranto.

State ex rel. Stain v. Christensen, 84 Utah 185, 35 P.2d 775, 812, and see Art. 8, § 4, Constitution of Utah, Revised Statutes of Utah.

Prior to the General Election of November 5, 1968, the office of State Auditor was a constitutional office. Art. 5, § 1 in so far as pertinent provided:

> "The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for two years beginning on the first Monday of January next after his election."

At the same election there was referred to the people by the legislature of Arizona Proposition No. 108, a proposed constitutional amendment, to abolish the office of State Auditor. It reads in its pertinent part:

> "Section 1. The Executive Department shall consist of Governor, Secretary of State, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for two years beginning on the first Monday of January next after his election."

The legislature also referred to the people Proposition No. 104 seeking to amend the existing Art. 5, § 1 by changing the terms of office for the Executive Department from two to four years. This included the office of State Auditor since it was at the time of referral an existing office. Proposition No. 104 reads in its pertinent part:

> "Section 1. The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for four years beginning on the first Monday of January, 1971 next after the regular general election in 1970."

Proposition No. 104 received 266,035 affirmative and 129,991 negative votes and Proposition No. 108 received 206,432 affirmative and 171,474 negative votes. Both were proclaimed as adopted by the Governor on December 4, 1968.

Respondent, Jewel W. Jordan, has held the office of State Auditor for many years and was re-elected at the General Election on November 5, 1968. It is her position that Proposition No. 104 is in conflict with Proposition No. 108 because Proposition No. 104 in specifically enumerating the offices of the Executive Department of the State *included* the office of State Auditor. By the Constitution, Art. 4, Part 1, § 1 (12), where two or more amendments to the Constitution adopted at the same election are in conflict, the one receiving the greater number of affirmative votes shall prevail. Proposition No. 104 received the greater number of affirmative votes.

In the decision of this court on December 31, 1968, the dissenting judges pointed out that "while Art. V § 1 consists of one sentence, structurally it has two distinct clauses, hence it is divisible into two severable parts," one enumerating the offices of the Executive Department and the other providing for their terms. The dissenting judges were of the opinion that the plain legislative purpose in referring two propositions to the people was to amend each clause separately, thereby permitting the electorate to decide separately whether the terms of office of the Executive Department should be increased to four years, and whether the office of State Auditor should be abolished. It was necessary that the propositions conform to Art. 21, § 1, Constitution of Arizona and the holding of this court in Kerby v. Luhrs, 44 Ariz. 208 at p. 221, 36 P.2d 549:

> "* * * if any one of the propositions, * * * is not such that the voters supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted, * * *."

This conclusion as to the purpose in submitting two propositions is made clear in the title to the Senate Concurrent Resolution No. 6 [Proposition No. 104] reading:

"A Concurrent Resolution

"Proposing an Amendment of the Constitution of Arizona Relating to the Executive Department; Providing For Four Year Terms For the Governor, Secretary of State, State Auditor, State Treasurer, Attorney General and Superintendent of Public Instruction, and Amending Article 5, Section 1, Constitution of Arizona."

and the title to the House Concurrent Resolution No. 1 [Proposition No. 108]:

"A Concurrent Resolution

"Proposing an Amendment of the Constitution of Arizona Abolishing the Office of State Auditor, and Amending Sections 1, 6 and 9 of Article 5, Constitution of Arizona."

Since Proposition No. 108 was passed by the legislature some nine days prior to Proposition No. 104, it could not logically have been the legislative purpose in referring Proposition No. 104 to the people to continue the office of State Auditor as an office of the Executive Department if a majority of the voters were in favor of Proposition No. 108 abolishing the office.

We do not think it necessary to extend this decision by repeating the reasons and authorities expressed and cited in the dissent. We have re-examined the views there set forth and are satisfied that they are correct. This decision is rested on the principle that the dominate canon of constitutional interpretation is to arrive at the purpose of the constitutional enactment; that in arriving at the purpose where, as here, separate parts of a constitution are seemingly in conflict, it is the duty of the court to harmonize both so that the constitution is a consistent workable whole.

The two propositions are in conflict only if the language of Proposition No. 104 is literally applied in a vacuum without searching for the end sought to be attained. By the construction here placed upon the two amendments they can be made to stand together, and Proposition No. 108 is not stricken down as nugatory so that its submission to the people at the General Election in November was not a pointless act.

Counsel for the litigants have searched meticulously for authority and precedent both from this and other jurisdictions. We have examined those cited and others and while they are enlightening, we find none which deal with the same facts and circumstances found here. But even if it were possible to say that another jurisdiction had passed on the same problem contrary to our conclusions presented in this case, we would adhere to the views expressed, confident that constitutional principles properly applied support the result reached. In this, a democratic society, we are irretrievably wedded to the principle that, subject to constitutional limitations, the will of the majority as expressed in free elections must prevail.

Since the people have abolished the State Auditor's office, we hold that Art. 5, § 1 has been amended by the adoption of Proposition No. 108 and No. 104 to read:

> "Section 1. The Executive Department shall consist of Governor, Secretary of State, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for four years beginning on the first Monday of January, 1971 next after the regular general election in 1970."

One further matter must be considered. Constitutional amendments referred to the people become law on the day the Governor proclaims them. Constitution of Arizona, Art. 4, part 1, § 1 (13). On December 4, 1968, the Governor proclaimed Propositions No. 104 and No. 108 adopted. On

proclamation of Proposition No. 108 as adopted, the office of State Auditor was abolished.

The legislature provided by Chapter 89, Laws of 1968, for a Commissioner of Finance to assume the duties of the State Auditor. By § 100 thereof it further provided:

> "This act shall not become effective until January 2, 1969 and not until the Constitution of Arizona is amended by vote of the people abolishing the office of state auditor."

The language used by the court in Lively v. Board of Education, 115 W. Va. 314, 175 S.E. 784, is applicable to the present situation:

> "It is quite generally recognized that when a public office is abolished by a duly constituted authority, the incumbent thereof ceased to be an officer, unless it is necessary to hold the persons assuming to act to be de facto officers to prevent great public injury."

We have said that a de facto officer is one whose acts though not those of a lawful officer are held valid so far as they involve the interests of the public and third persons. Rogers v. Frohmiller, 59 Ariz. 513, 130 P.2d 271. Hence, in order to avoid great public inconvenience, we further hold that Jewel W. Jordan presently occupies the office of State Auditor as a de facto officer and is entitled to discharge the duties of the office and to the emoluments thereof until succeeded in the manner provided by law.

It is the order of the court that a judgment of ouster will issue to respondent, Jewel W. Jordan, immediately upon a showing to this court that a Commissioner of Finance has been appointed and has qualified pursuant to the applicable provisions of Chapter 89, Laws of 1968.

FRED C. STRUCKMEYER, JR., Justice

CONCURRING:

JESSE A. UDALL, Chief Justice

JACK D. H. HAYS, Justice

McFARLAND, Justice, and LOCKWOOD, Vice Chief Justice, DISSENTING

On December 31, 1968, a majority of this Court, as it was then constituted,[1] entered a final judgment in this original proceeding in quo warranto that "Proposition 108 has not been adopted, and did not become a part of the Constitution of Arizona," and that the respondent "now legally holds office as State Auditor, and, a certificate of election having been issued to her by the Secretary of State certifying her election as State Auditor on November 5, 1968, is entitled to continue to hold such office for a two-year term, commencing the first Monday in January, 1969." On the strength of this judgment, the respondent took her oath of office on January 6, 1969.

We re-emphasize the principles set forth in our former opinion, State v. Jordan, —— Ariz. ——, —— P.2d ——, and our judgment based thereon. There is little cause to repeat the reasoning of that judgment.

There is nothing new presented either in the Attorney General's motion or the present majority's opinion. The same arguments were made by the Attorney General in his original motion and brief as are contained in his motion for rehearing, and the same issues are contained in the previous minority opinion as those now in the present majority opinion.

The question presented was whether there was conflict in Propositions 104 and 108. As previously pointed out, Proposition 104 vests the Executive Department in the Governor, Secretary of State, State Auditor, State Treasurer, Attorney General and Superintendent of Public Instruction, to hold office for four years; and Proposition 108 vests

[1] The present minority was joined by then Mr. Justice Bernstein in the majority opinion filed on Dec. 31, 1968. Since then, but prior to the filing of the petition for rehearing, Mr. Justice Bernstein has been replaced on this Court by Mr. Justice Hays who joins with the former minority in the present judgment.

the Executive Department in the Governor, Secretary of State, State Treasurer, Attorney General and Superintendent of Public Instruction, each to hold office for two years. As we said before, they are in irreconcilable conflict. Furthermore, they were very confusing to the voters in that many may have voted for Proposition 108—not to abolish the office of Auditor, but because they favored a two-year term of office. Were both propositions, as they appeared on the ballot, to be placed in the Constitution in haec verba the conflict would be apparent and they would, of course, be impossible of construction or interpretation. Where this test shows such a conflict, then there should be no doubt but that under our Constitution the one receiving the lesser number of votes does not become a part of the Constitution. All of this is more fully set forth in the judgment of the original majority and is supported by precedents from other states.

The new majority says:

> "In this, a democratic society, we are irretrievably wedded to the principle that, *subject to constitutional limitations*, the will of the *majority* as expressed in free elections must prevail." (Emphasis added.)

It was precisely this principle that formed the foundation of the prior judgment. We there resolved the obvious conflict in the proposed amendments—which conflict the majority still acknowledge—by sustaining Proposition 104 which received the greater number of votes of the public. That decision was dictated by Article IV, part 1, section 1, paragraph 12 of the Constitution of Arizona.[2]

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[2] "(12) [Conflicting measures or constitutional amendments] If two or more conflicting measures or amendments to the Constitution shall be approved by the people at the same election, the measure or amendment receiving the greatest number of affirmative votes shall prevail in all particulars as to which there is conflict."

We are of the opinion the present majority indulge in, what we referred to as, "judicial legislation" by "picking and choosing" certain clauses from each of the propositions to form a composite amendment to the Constitution. Under the circumstances we feel that any lingering doubts as to the intent of the electorate should have been laid to rest—not by this Court straining to construe the conflicting proposals, but by resubmitting the question, in clear form, to the people.

While we feel we should briefly point out the defects in the present majority's opinion on the merits, there is a new and most serious question presented in this case, which we view with grave concern; namely, the procedure used to upset the former majority opinion.

The majority cite as precedent for granting the rehearing State v. Superior Court of Maricopa County, 93 Ariz. 149, 379 P.2d 133, rehearing 93 Ariz. 351, 380 P.2d 1009; Lane v. Matthews, 75 Ariz. 1, 251 P.2d 303; and Arizona Com. Min. Co. v. Iron Gap Co., 29 Ariz. 23, 239 Pac. 290. In the former case, the question presented here was neither raised nor considered by this Court, while the latter two involved an appeal—not this Court's original jurisdiction. However, the respondent in the instant case vigorously opposed the Attorney General's motion for rehearing on the grounds that no procedure is provided for reconsidering a judgment in quo warranto, rendered under this Court's original juisdiction. As was pointed out by the respondent, Rule 9 of the Arizona Supreme Court Rules, 17 A.R.S., read in conjunction with Rule 8 is applicable only to rehearings on an appeal. Rule 1, which covers quo warranto heard under this Court's original jurisdiction, makes no provision for reconsideration of a final judgment. With this we agree.

Not only do we of the present minority agree but the Attorney General previously agreed with this in State v. Bohannan, 101 Ariz. 520, 421 P.2d 877, wherein, in opposition to a petition for rehearing, he said in his response:

"THE MOTION FOR REHEARING IS NOT PROPER

"The provisions relative to rehearing matters decided by this Court are contained in the sections relating to civil appeals and criminal appeals. There is no provision under Rules 1 and 2 governing writs, providing a rehearing before this Court when a writ has been issued. It is elementary that a motion for rehearing is not a substantial part of any matter before this Court. It is purely a statutory grant, and there is no constitutional or logical mandate requiring that rehearings be allowed. This Court has heretofore indicated that the decision of December 21, 1966, was the writ of the Court and that no further mandate was necessary. Since the mandate or decision of the Court has been rendered, it would appear that a motion for rehearing now could accomplish nothing. See for example, the provisions under Rule 14 relating to the issuance of mandates in appeals. It is, therefore, our belief that this Court should summarily dismiss the petition for rehearing on the grounds that it does not lie within the provisions of the rules of this Court.

* * * * * * * * * * *

"It is, therefore, respectfully submitted that the motion for rehearing should be dismissed or in the alternative be denied." State v. Bohannan, No. 8841.

And this Court obliged him. There has been no change in our Rules since the Bohannan case. The only change is that in Bohannan the Attorney General was opposing a rehearing while here he now is seeking it, which is a poor reason for this Court to reverse its former stand.

We acknowledge that this Court has inherent power to change, alter or modify its own judgment, while such judgment is under its control, but such power must be exercised within a properly promulgated statute or rule. Overson v. Martin, 90 Ariz. 151, 367 P.2d 203; Wolfe v. Hammer, 202

Tenn. 170, 303 S.W.2d 716; Atlantic Coast Line R. Co. v. City of Lakeland, (Fla.) 115 So. 669, 679; People v. Mayor, et al., of New York, 25 Wend. 251; 5 C.J.S. 538.

In Lane v. Matthews, supra, cited by the majority, the court, in discussing its inherent powers over its own judgments, referred to 3 Am.Jur., App. & Err., § 796, page 345, as one of its authorities. But that section further states that the power of a court to grant a rehearing must be exercised "before a decree has been carried into execution." The original judgment filed in this case on December 31, 1968, was also the mandate of this Court. A judgment in quo warranto, by its very nature, is self-executing and by its own force accomplishes its object without any further action by the court. State v. Chapman, 187 Wyo. 327, 60 P.2d 245; State ex rel. Jones v. Wise, 39 Del. 409, 200 A. 418; 74 C.J.S. 276. On January 6, 1969, when the respondent took her oath of office and entered upon her duties, the judgment was fully executed and this Court retained no further jurisdiction. This is exactly what the Attorney General argued in State v. Bohannan, supra. It apparently was good law then and in our opinion it is still good law, until and unless there is a statute or rule granting a rehearing in such cases and suspending the effect of the judgment during this time.

The majority acknowledge that Rule 1 does not set forth a procedure for rehearing but note that "neither does the rule expressly prohibit a rehearing." Such a philosophy is hardly in keeping with the "rule-making" power of this Court and we are sure that this Court would be among the first to chastise a lower court which indulged itself in any such permissive interpretation of the Rules. Further, such a philosophy runs counter to this Court's own attitude that even the right of appeal exists only by force of the Constitution and statutes, State v. Moore, 48 Ariz. 16, 58 P.2d 752; State v. Superior Court in and for Pinal County, 25 Ariz. 226, 234, 215 Pac. 538, and in the absence of such statutes this Court has no jurisdiction to hear the matter. State v. Phelps, 67 Ariz. 215, 193 P.2d 921. This Court has

further stated, in discussing Rule 9, supra, that "It is the general rule that, in the absence of a statute, an appellate court has no power to reconsider, alter or modify its decision." Overson v. Martin, supra. We are at a loss to understand how this Court can deny jurisdiction in such cases where no explicit statute confers the same, but in this case can assume jurisdiction because no rule prevents it.

We feel that the law set forth above should have been sufficient to result in summary dismissal of the petition. But since the majority nonetheless granted it, some comment is in order on the lack of grounds, for rehearing, presented by the Attorney General. He commences his petition, "It seems clear to the petitioner that the decision of this Court, as now written, finds conflict where no conflict exists or was intended to exist * * *" and continues in a restatement of the arguments presented prior to the original judgment, and a discussion of how the original majority misconstrued the cases cited therein. It is a mere rehash of old arguments. That such arguments do not constitute grounds for setting aside the judgment is a well-established principle of general application by appellate courts throughout the United States. See 5 C.J.S. 540, note 67.

> "Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation." State v. Green, Fla., 105 So.2d 817.

A case peculiarly apt to the situation here is Woodbury v. Dorman, 15 Minn. 341 (15 Gil.274), where the majority of a newly constituted court, although in obvious disagree-

ment with a decision of the former majority, refused to grant a rehearing. The court said:

"Taking the points presented upon the reargument, which was permitted under protest, as the grounds upon which it is claimed that the case should be reexamined, we are compelled to say that there is nothing in them, which we conceive to be substantial or important, which was not urged and considered upon the original argument and examination of the case. The rule governing applications for reargument, above referred to, has, so far as our information extends, been generally acquiesced in and observed in this court. We think it a wholesome rule, and perceive no sufficient reason for excepting this case from its operation. See, also, Brown v. Aspden, 14 How. 26; 1 Black, 488; Mount v. Mitchell, 32 N.Y. 702; Kent v. Waters, 18 Md. 53, 73; Johns v. Johns, 20 Md. 59.

"The majority of this court, as it was constituted at the time of the original hearing and decision of this case, after much discussion and deliberation, came to conclusions (myself dissenting) which led to the affirmance of the judgment. Since the decision was filed, the author of the majority opinion has been succeeded by the present chief justice. Were the court now constituted as it was when the decision was rendered, there is not the slightest reason to suppose that the decision would be changed. So that if a reargument were now allowed, and the former decision reversed, this result would follow, not from a conviction upon the part of the members of the court by which the case was originally heard and determined that the decision was erroneous, nor from the consideration of reasons and arguments not before advanced and considered, but solely from the change in the composition of the court.

"Under such circumstances, a relaxation of the ordinary rules governing applications for reargument would seem to be peculiarly ill-timed.

> "It would, in our opinion, be a violation of proprieties in the administration of justice which it is the duty of a court to maintain, and would tend to destroy that respect for and confidence in judicial tribunals, the loss of which every good citizen would deplore. See remarks of Chancellor Walworth in People v. Mayor, etc., of N.Y., 25 Wend. 254. The application for the reargument must therefore be denied." Woodbury v. Dorman, supra.

Many cases have supported Woodbury v. Dorman in holding a change in membership of the court is not grounds for granting a rehearing. See, e.g., Rohlfing v. Moses Akiona, Ltd., 45 Haw. 440, 369 P.2d 114; Peoples v. Evening News Ass'n., 51 Mich. 11, 16 N.W. 691; Flaska v. State, 51 N.M. 13, 177 P.2d 174, 186; Cordner v. Cordner, 91 Utah 474, 64 P.2d 828. In Gas Products Co. v. Rankin, 63 Mont. 372, 207 Pac. 993, the Montana Supreme Court cited and re-emphasized the value of the Woodbury rule; and the North Dakota Supreme Court similarly denied a petition for rehearing in Golden Valley County v. Greengard's Estate, 69 N.D. 171, 284 N.W. 423. In both the Gas Products and Golden Valley cases, the dissenting justices in the original opinions concurred with the denial of the rehearing.

This attitude towards rehearings is a "long-established rule" of this Court. Climate control, Inc. v. Hill, 87 Ariz. 201, 349 P.2d 771, app. dismissed 364 U.S. 409, 81 S.Ct. 180; Phelps Dodge Corp. v. Industrial Comm., 90 Ariz. 379, 368 P.2d 450; Cerro Cobre Development Co. v. Duvall, 18 Ariz. 334, 160 Pac. 25; Territory v. Delinquent Tax List, 3 Ariz. 69, 89, 21 Pac. 888. Its applicability to the instant case can be best expressed by quoting from the earliest Arizona case on this subject:

> "This was an action of ejectment to recover possession of mining ground. The cause was tried below by the court and jury, and a verdict was rendered for plaintiff, and judgment accordingly. The defendant moved for a new trial, which was overruled, and he appealed

> to this court. The cause was submitted to the January term, A.D., 1885, of this court, and the judgment was affirmed. Arizona Prince Copper Company v. Copper Queen Mining Company, Ante 210, 7 Pac. 718. Defendant petitioned this court for a rehearing of the cause, which was granted, and the case was reargued, and again submitted. Neither the petition itself nor the argument of the case, point out any misapprehension of the record by this court, or any mistake in the law of the case. Every question urged upon us was submitted and considered by the court on the former hearing. We are, in effect, asked to review that decision of this court. This we decline to do. It is not the office or purpose of a rehearing to reopen the whole cause, and to require of the court a reconsideration of the whole case. Were this precedent to be established, it would open the doors for petitions for rehearing of all causes, and we should expect them more particularly when the persons who compose the court have been changed." Copper Queen Mining Co. v. Arizona Prince Copper Co., 2 Ariz. 169, 11 Pac. 396, app. dismissed 127 U.S. 782, 32 L.Ed. 331.

It is no longer a question whether or not the majority of this Court agree or disagree with the original judgment in this cause but that in the course of reversing it the present majority has resorted to an unauthorized procedure and has, additionally, set aside a long established rule of this Court. It would seem that this Court can no longer, in good conscience, deny petitions for rehearing in any case coming before us, no matter how repetitious they may be.

Of equal import is the entire manner by which the respondent was divested of her right to hold the office of State Auditor. As we previously pointed out, the respondent was legally elected to her office of State Auditor and a certificate of election was issued to her before the Governor's proclamation of passage of Proposition 108; the judg-

ment of this Court was made on December 31, 1968, which held Proposition 108 was not adopted as a constitutional amendment and respondent was legally entitled to hold the office of State Auditor for the two years for which she was elected; respondent took her oath of office and entered into the duties of State Auditor on January 6, 1969, and from that date to this she has performed the constitutional duties of State Auditor. Now, without a procedure being provided for setting aside this judgment, she is by the present majority of this Court being deprived of this office. To oust the respondent from office in this manner would be against the natural and inherent principles of justice which are implicit in due process.

We must, therefore, dissent.

ERNEST W. McFARLAND,
Justice

LORNA E. LOCKWOOD,
Vice Chief Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

No. 9480

STATE OF ARIZONA, *ex rel* THE ATTORNEY GENERAL,
GARY K. NELSON, *Petitioner*,

vs.

JEWEL W. JORDAN, *Respondent*.

Original Proceeding in Quo Warranto by Petitioner To Determine Whether Respondent Holds an Existing Office

JUDGMENT FOR RESPONDENT

Hon. Gary K. Nelson, The Attorney General
Attorney for Petitioner

R. G. Langmade, Phoenix, Attorney for Respondent

McFARLAND, Chief Justice:

The State of Arizona, upon the relation of Gary K. Nelson, The Attorney General, brings this original action in quo warranto, asking that this Court adjudge the respondent Jewel W. Jordan not entitled to hold or enjoy the office of State Auditor, and that a judgment of ouster be entered against her.

The Twenty-first Legislature in 1968 adopted House Concurrent Resolution 1, and Senate Concurrent Resolution 6 each proposing to amend the Arizona Constitution, and reading respectively as follows:

"House Concurrent Resolution 1

'A Concurrent Resolution

Proposing an Amendment of the Constitution of Arizona Abolishing the Office of State Auditor, and Amending Sections 1, 6 and 9 of Article 5, Constitution of Arizona

"Be it resolved by the House of Representatives of the State of Arizona, the Senate concurring:

"1. The following amendments of sections 1, 6 and 9 of article 5, Constitution of Arizona, are proposed, to become valid when approved by a majority of the qualified electors voting thereon and upon proclamation of the governor:

"Section 1. The Executive Department shall consist of Governor, Secretary of State, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for two years beginning on the first Monday of January next after his election.

"The persons, respectively, having the highest number of votes cast for the office voted for shall be elected, but if two or more persons shall have an equal and the highest number of votes for any one of said offices, the two Houses of the Legislature at its next regular session shall election forthwith, by joint ballot, one of such persons for said office.

"The officers of the Executive Department during their terms of office shall reside at the seat of government where they shall keep their offices and the public records, books, and papers. They shall perform such duties as are prescribed by the Constitution and as may be provided by law.

"Section 6. In the event of the death of the Governor, or his resignation, removal from office, or permanent disability to discharge the duties of the office, the Secretary of State, if holding by election, shall succeed to the office of Governor until his successor shall be elected and shall qualify. If the Secretary of State be holding otherwise than by election, or shall fail to qualify as Governor, the Attorney General, the State Treasurer, or the Superintendent of Public Instruction, if holding by election, shall, in the order named, succeed to the office of Governor. The taking of the oath of office as Governor by any person specified in this section shall constitute resignation from the office by virtue of the holding of which he qualifies as Governor. Any successor to the office shall become Governor in fact and entitled to all of the emoluments, powers and duties of Governor upon taking the oath of office.

"In the event of the impeachment of the Governor, his absence from the State, or other temporary disability to discharge the duties of the office, the powers and duties of the office of Governor shall devolve upon the same person as in the case of vacancy, but only until the disability ceases.

"Section 9. The powers and duties of Secretary of State, State Treasurer, Attorney General, and Superintendent of Public Instruction shall be as prescribed by law.

"2. The proposed amendments (approved by a majority of the members elected to each house of the legislature, and entered upon the respective journals thereof, together with the ayes and nays thereon) shall be by the secretary of state submitted to the qualified electors at the next regular general election (or at a special election called for that purpose), as provided by article 21, Constitution of Arizona.

"Passed the House February 26, 1968 by the following vote; 31 Ayes, 22 Nays, 7 Not Voting.

"Passed the Senate March 12, 1968 by the following: 17 Ayes, 12 Nays, 1 Not Voting.

"Approved by the Governor—March 13, 1968.

"Filed in the Office of the Secretary of State—March 13, 1968.

"SENATE CONCURRENT RESOLUTION 6

"A CONCURRENT RESOLUTION

"PROPOSING AN AMENDMENT OF THE CONSTRUCTION OF ARIZONA RELATING TO THE EXECUTIVE DEPARTMENT; PROVIDING FOR FOUR YEAR TERMS FOR THE GOVERNOR, SECRETARY OF STATE, STATE AUDITOR, STATE TREASURER, ATTORNEY GENERAL AND SUPERINTENDENT OF PUBLIC INSTRUCTION, AND AMENDING ARTICLE 5, SECTION 1, CONSTITUTION OF ARIZONA.

"Be it resolved by the Senate of the State of Arizona, the House of Representatives concurring:

"1. The following amendment of article 5, section 1, Constitution of Arizona, is proposed, to become valid when approved by a majority of the qualified electors voting thereon and upon proclamation of the governor:

"Section 1. *Executive department; State officers; terms; election; residence and office at seat of government; duties*

"Section 1. The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for four years beginning on the first Monday of Janu-

ary, 1971 next after the regular general election in 1970.

"The persons, respectively, having the highest number of votes cast for the office voted for shall be elected, but if two or more persons shall have an equal and the highest number of votes for any one of said offices, the two Houses of the Legislature at its next regular session shall elect forthwith, by joint ballot, one of such persons for said office.

"The officers of the Executive Department during their terms of office shall reside at the seat of government where they shall keep their offices and the public records, books, and papers. They shall perform such duties as are prescribed by the Constitution and as may be provided by law.

"2. The proposed amendment (approved by a majority of the members elected to each house of the legislature, and entered upon the respective journals thereof, together with the ayes and nays thereon) shall be by the secretary of state submitted to the qualified electors at the next regular general election (or at a special election called for that purpose), as provided by article 21, Constitution of Arizona.

"Passed the House March 21, 1968 by the following vote: 33 Ayes, 16 Nays, 11 Not Voting.

"Passed the Senate March 21, 1968 by the following vote: 16 Ayes, 11 Nays, 3 Not Voting.

"Filed in the Office of the Secretary of State—March 21, 1968."

Thereafter the full texts of the resolutions were printed in the official publicity pamphlet in conformity with A.R.S. § 19-123."

Both resolutions were submitted to the electors at the general election of November 5, 1968, the Senate Resolution appearing on the ballot as Proposition 104 and the House Resolution as Proposition 108. According to the official canvass both resolutions were carried by a majority of the votes cast, but Proposition 104 received 266,035 affirmative votes to 129,991 negative, and Proposition 108 received 206,432 affirmative, 171,474 negative. On December 4, 1968, the Governor issued a proclamation declaring both amendments to be law.

The propositions appeared on the ballot in the following form:

REFERENDUM ORDERED BY PETITION BY THE PEOPLE

HOUSE CONCURRENT RESOLUTION 1

A CONCURRENT RESOLUTION

PROPOSING AN AMENDMENT OF THE CONSTITUTION OF ARIZONA ABOLISHING THE OFFICE OF STATE AUDITOR, AND AMENDING SECTIONS 1, 6 AND 9 OF ARTICLE 5, CONSTITUTION OF ARIZONA.

(SUMMARY)

Amending Sections 1, 6 and 9 of Article 5 of the Constitution of Arizona, thereby abolishing the office of the State Auditor.

If you favor the above law, vote YES; if opposed, vote NO.

108

NO ☐

YES ☐

REFERENDUM ORDERED BY PETITION OF THE PEOPLE

SENATE CONCURRENT RESOLUTION 6

A CONCURRENT RESOLUTION

PROPOSING AN AMENDMENT OF THE CONSTITUTION OF ARIZONA RELATING TO THE EXECUTIVE DEPARTMENT; PROVIDING FOR FOUR YEAR TERMS FOR THE GOVERNOR, SECRETARY OF STATE, STATE AUDITOR, STATE TREASURER, ATTORNEY GENERAL AND SUPERINTENDENT OF PUBLIC INSTRUCTION, AND AMENDING ARTICLE 5, SECTION 4, CONSTITUTION OF ARIZONA.

(SUMMARY)

Amending Section 1 of Article 5 of the Constitution of Arizona by changing from two years to four years the terms of the Governor, Secretary of State, State Auditor, State Treasurer, Attorney General and Superintendent of Public Instruction, beginning January, 1971.

If you favor the above law, vote YES; if opposed, vote NO.

YES ☐

104

NO ☐

The Attorney General of the State, in the application for a Writ of Quo Warranto, claims that both of the amendments are effective, that the office of the State Auditor has been abolished, and that upon the proclamation of the Governor the office no longer exists. The respondent Auditor on the other hand maintains that Proposition 104 specifically provides that the State Auditor shall be a part of the Executive Department with a term of office for four years after the first Monday in January 1971 while Proposition 108 eliminated the State Auditor from the Executive Department, and provided that the officer should hold office for two years, effective on the first Monday of January next after the election, and therefore are in conflict.

Article 21, Arizona Constitution, sets forth the mode of amending the Constitution. It reads as follows:

"ARTICLE XXI

"MODE OF AMENDING

"Sec.

1. Introduction in legislature; initiative petition; election.

2. Convention.

"§ 1. Introduction in legislature; initiative petition; election.

"Section 1. Any amendment or amendments to this Constitution may be proposed in either House of the

Legislature, or by Initiative Petition signed by a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for Governor at the last preceding general election.'

"Any proposed amendment or amendments which shall be introduced in either House of the Legislature, and which shall be approved by a majority of the members elected to each of the two Houses, shall be entered on the journal of each House, together with the ayes and nays thereon. *When any proposed amendment or amendments shall be thus passed by a majority of each House of the Legislature and entered on the respective journals thereof, or when any elector or electors shall file with the* Secretary of State any proposed amendment or amendments together with a petition therefor signed by a number of electors equal to fifteen per centum of the total number of votes for all candidates for Governor in the last preceding general election, *the Secretary of State shall submit such proposed amendment or amendments to the vote of the people at the next general election* (except when the Legislature shall call a special election for the purpose of having said proposed amendment or amendments voted upon, in which case the Secretary of State shall submit such proposed amendment or amendments to the qualified electors at said special election,) *and if a majority of the qualified electors voting thereon shall approve and ratify such proposed amendment or amendments in said regular or special election, such amendment or amendments shall become a part of this Constitution.* Until a method of publicity is otherwise provided by law, the Secretary of State shall have such proposed amendment or amendments published for a period of at least ninety days previous to the date of said election in at least one newspaper in every county of the State in which a newspaper shall be published, in such manner as may be prescribed by

law. *If more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately.*" [Emphasis added.]

In the instant case we are not concerned with Section 2 of Article XXI which provides for amendments by Constitutional Convention.

The last sentence quoted above has been interpreted by our Court in the case of Kerby v. Luhrs, 44 Ariz. 208, 36 P.2d 549. Therein citing State v. Timme, 54 Wis. 318, 11 N.W. 785, this Court approved the general rule construing such a provision to mean that amendments which had different objects and purposes in view must be submitted separately, and that in order to reconstitute more than one amendment, the proposition submitted must relate to more than one subject and have at least two distinct and separate purposes not dependent upon or connected with each other. In other words, if the changes in the proposed amendment

> ". . . cover matters necessary to be dealt with in some manner in order that the Constitution as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But if any one of the propositions, although not directly contradicting the others does not refer to such matters, or if it is not such that the voters supporting it would reasonably be expected to support the principle of the others then there are in reality two or more amendments to be submitted, and the proposed amendment falls within the constitutional prohibition." Kerby v. Luhrs, supra, at 221, 36 P.2d at 554.

It is obvious that the Legislature was mindful of this requirement, that each amendment having a different object or purpose, must be submitted separately. Hence, although the two amendments applied to but one section of the Constitution, they were submitted as separate propositions.

Nowhere in Article 21, which gives in detail the method of amending the Constitution, is there a suggestion of the form which the amendment shall take (with the exception of the requirement that if more than one proposed amendment is submitted, each amendment must be submitted separately so that the electors may vote for or against each one separately).

It may be noted that Article 21 provides a method of publicity of proposed amendments to be followed until otherwise provided by law. The Legislature has made such provision in A.R.S. § 19-123. This provides for publishing of a publicity pamphlet which shall contain:

> "1. A true copy of the title and text of the measure or proposed amendment.
>
> "2. The form in which the measure or proposed amendment will appear on the ballot, the official title, the descriptive title prepared by the secretary of state, and the number by which it will be designated.
>
> "3. The arguments for and against the measure or amendment."

In the present instance the Secretary of State published the publicity pamphlet in the form required by the statute.

It will be noted that under Article IV, Part 2, of the Constitution dealing with the Legislature, there are detailed provisions regarding the procedure to be followed in enacting statutes. Two of these read as follows:

> "§ 13. Every act shall embrace but one subject and matters properly connected therewith, which subject

shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

"§ 14. No act or section thereof shall be revised or amended by mere reference to the title of such act, *but the act or section as amended shall be set forth and published at full length.*" [Emphasis added.]

An examination of several concurrent resolutions of the Legislature proposing other amendments to the Constitution in past years shows that the same format as followed in the present instance has been used. That is, after the title, the resolution is

"Be it resolved by the Senate (or House of Representatives) of the State of Arizona, the House of Representatives (or Senate) concurring: (1) The following amendment of Article ——, Section ——, Constitution of Arizona, is proposed, to become valid when approved by a majority of the qualified electors voting thereon and upon proclamation of the Governors."

The text of the section follows in haec verba reading as the section would read if amended as proposed.

It would appear that the Legislature may have used this form because of its familiarity with the requirement of Section 14 of Article IV, Part 2, Arizona Constitution, that the act or section to be amended must be set forth at full length, and that it cannot be revised or amended by mere reference to the title of such act. It is obvious, however, that this requirement goes only to acts or statutes which can be passed by the Legislature, and does not refer to proposed amendments to the Constitution which must be referred to the people for final passage.

Although the immediate question of whether two proposed amendments are in conflict has never been raised

in this State, there are at least two other States having similar constitutional provisions which have spoken upon the subject.

The same question was raised in the State of Idaho in the case of McBee v. Brady, 15 Ida. 761, 100 P. 97. The Legislature by Joint Resolution No. 10 attempted to amend a Section 6 of the Constitution by adding thereto the word "Assessor" among the names of the officers who were empowered to appoint deputies and clerical assistants by the Board of County Commissioners. Joint Resolution No. 3 referring to the same Section 6 proposed to amend it by the omission of the words "Probate Judge" while the words "Probate Judge" were allowed to remain in Section 6 under Resolution No. 10. Thus, the first amendment (Resolution No. 10) contains Section 6 with the words "Probate Judge" out, and the word "Assessor" out while the second amendment (Resolution No. 3) contains the section with the words "Probate Judge" in and the word "Assessor" in.

The Idaho Court held that it was impossible to reconcile the two amendments, and therefore impossible to determine which of the two amended sections should stand as a part of the Constitution.

The Idaho Court, in discussing the conflict in the two proposed amendments under Resolution 10 and Resolution 3, stated:

> ". . . The conflict in these two sections arises out of the method adopted and pursued by the Legislature in amending the same section and article, the same time. In other words, it is impossible to amend the same section *if the section as a whole is proposed as the amendment in two different respects at the same time. The conflict will always occur.* Referring again to the suggestions heretofore made as to the method of proposing and adopting amendments to the Constitution, we think the better course is that the proposition to amend refers to the particular matter of which the

amendment consists, in which case no conflict need necessarily arise." McBee v. Brady, supra, at 105 [Emphasis added.]

The Legislature in Idaho in its joint resolution provided that the section to be amended should "be amended to read as follows:" setting it out in haec verba.

McBee cites the leading case of Gabbert, Administrator, v. Chicago, R. I. & P. Ry. Co., 171 Mo. 84, 70 S.W. 891. There the court had a similar problem in that the legislature submitted to the people two proposed constitutional amendments which were to amend the same section of the Constitution. The two amendments did embrace separate propositions, and the Constitution of Missouri having a similar provision that "proposed amendments shall be submitted to a vote of the people, each amendment separately," the Legislature did so submit them. The Missouri statute, providing for publicity, required that the Secretary of State certify the form of the ballot to the various county clerks "indicating the character and nature of the proposed amendments." The court, in its opinion, sets forth the manner in which they were submitted:

> "'Seventh Constitutional Amendment. Providing that, in courts not of record, two-thirds of the jury may render a verdict in civil cases; in courts of record, three-fourths of the jury.
>
> "'Sixth Constitutional Amendment. Providing that no grand jury shall be convened, except upon order of judge of court having power to try and determine felonies, but, when so assembled, may indict for any crime.'
>
> "*As thus submitted on the ballots, and as set out in the resolutions,* these two constitutional amendments are perfectly consistent, and the ballots were in no sense misleading; but it is urged with great earnestness by

> defendant, in a brief by an amicus curiae, that the sixth amendment defeats the seventh. The argument is based upon the fact that the resolutions themselves, after setting out specifically the words which it is proposed to add to said section 28 of article 2, and which in fact constitute the amendment in each case, proceed to say, 'So that said section of the constitution when amended shall read as follows.' . . ." Gabbert v. Ry. Co., supra, at 892 [Emphasis added.]

Thus, the Missouri Court held that the amendments in this instance were entirely consistent, each relating to a distinct subject, and that the fact that the Legislature *after setting forth the nature of the amendment,* had added the words "so that said section of the Constitution when amended shall read as follows," and had set forth the section as it was proposed to read in haec verba, had no effect, since it was not required by the Constitution, and the Legislature had already indicated clearly the nature of each amendment, which was not in conflict with the other.

In the instant case we find that although the Legislature did not state "§ 1 of Article 5 of the Constitution of Arizona *shall read as follows*" the language used, i.e., "the following amendment of Article 5, § 1, Constitution of Arizona is proposed" can only have one meaning to the voter—that the text which follows must be read in full, without adding or subtracting any other words, and constitutes the proposed amendment which will become that section of the Constitution if adopted. In addition, Senate Concurrent Resolution 6 sets forth in the title that the four-year terms are for the "Governor, Secretary of State, *State Auditor,* State Treasurer, Attorney General and Superintendent of Public Instruction," [Emphasis added], and this title is used as the text which was set forth on the ballot as indicating what the proposed amendment was.

In the body of the section thus set out, in Proposition 104 the language is:

> "The Executive Department shall consist of Governor, Secretary of State, *State Auditor,* State Treasurer, Attorney General and Superintendent of Public Instruction *each of whom shall hold his office for four years* beginning on the first Monday of January, 1971 next after the regular general election in 1970." [Emphasis added.]

Proposition 108 in the title states the nature of the amendment as "Proposing an amendment of the Constitution of State of Arizona abolishing the office of State Auditor, . . ." However, in the body of the House Concurrent Resolution 1, Section 1, describing the Executive Department, it is stated that it

> ". . . shall consist of Governor, Secretary of State, State Treasurer, Attorney General and Superintendent of Public Instruction, *each of whom shall hold his office for two years* beginning on the first Monday of January next after his election." [Emphasis added.]

The similar language in each of the proposed amendments, i.e., "The following amendment of Article 5, Section 1, Constitution of Arizona, is proposed," certainly has the effect of informing the voters that the entire text is the amendment to the Constitution. Obviously, when in the same section under one Concurrent Resolution, the State Auditor is included as part of the Executive Department, and in the other section the State Auditor is omitted, and in one section the terms of office for the Executive Department are set at four years and at two years by two separate resolutions, it cannot be doubted that they are in conflict. Not only does a conflict exist, but the form in which the amendments were submitted could only be confusing to the electors.

We call attention to the fact that, since Proposition 104 provided that the State Auditor be elected for a term of office of four years, a large number of the voters may have

been voting for Proposition 108 for the purpose of keeping the terms of office at two years. This Court is unable to say what percent voted for Proposition 108 for this reason, and what percent may have voted for it because it eliminated the Auditor's office. We are not permitted to enter into such conjecture. The problem becomes even more complex when one considers that 275,964 of the electors voted for the respondent to succeed herself in the very office to have been abolished.

Courts in other jurisdictions, when faced with a similar situation, have held that the result of such a conflict is that both amendments must fall. In re Senate File 31, 25 Neb. 864, 41 N.W. 981; McBee v. Brady, 15 Ida. 761, 100 P. 97; Opinion to the Governor, 78 R.I. 144, 80 A.2d 165; 16 Am. Jur.2d 248; Cooley's Constitutional Limitations, p. 130 (8th ed.). This Court is not faced with such a harsh result by virtue of Article IV, Part 1, Sec. 1, Para. 12, of the Constitution of Arizona which, in clear and unmistakable terms, provides the solution to this matter:

> "If two or more conflicting measures or amendments to the Constitution shall be approved by the people at the same election, the measure or amendment receiving the greatest number of affirmative votes shall prevail in all particulars as to which there is conflict."

But the Attorney General urges upon us the rule that both amendments

> ". . . must be construed together and effect given to both. Differences, if there are any, must, if possible, be reconciled." Cooley's Constitutional Limitations, pp. 129-130 (8th ed.)

He maintains that reconciliation can be effected by looking to the legislative intent as expressed in the minutes of the Legislature, and the publicity pamphlet. Such extrinsic evidences of legislative intent, although entitled to some

weight, are not controlling, particularly where, as here, each amendment is clear on its face and capable of only one interpretation. Ward v. Stevens, 86 Ariz. 222, 344 P.2d 491; Adams v. Bolin, 74 Ariz. 269, 247 P.2d 617; McCurtain County Excise Bd. v. St. Louis-San Francisco Ry. Co., Okla., 340 P.2d 213. See also Cooley, supra, at page 143. Furthermore, if resort to rules of construction were required here, the intent of the people who adopted the amendments would be controlling. County of Apache v. Southwest Lumber Mills, Inc., 92 Ariz. 323, 376 P.2d 854; Cooley, supra, at pp. 124-127. If this Court were to ignore the plain language of each amendment, wherein the intent of the people is to be first found—Hines v. Winters, Okla., 320 P.2d 1114; Monoghan v. School District No. 1 Clackamas County, 211 Or. 360, 315 P.2d 797—and attempt to discover a different intent of the electors, it would be faced with an insurmountable task. As previously pointed out, it would be mere conjecture. The courts in McBee v. Brady, supra, and Opinion to the Governor, supra, acknowledged the impossibility of divining their intent.

The court, in McBee, supra, at 105, in discussing this subject, stated:

> "It is next urged by counsel for defendant that section 6, art. 18, included as a part of said proposed amendment, is in conflict with the same section and article covered by a proposed amendment thereto by joint resolution No. 10 passed by the Legislature at the same session, and submitted and voted upon by the electors of the state at the same election and by them adopted. Sess. Laws 7907, p. 585. Section 6 as amended by the amendment submitted by Joint resolution 3 changed such section by omitting therefrom the words 'probate judge.' The amendment submitted under joint resolution No. 10 amended said section by adding thereto the word 'assessor' among the names of the officers who were empowered to appoint deputies and clerical

assistants by the board of county commissioners. Resolution No. 3 submitted section 6, amended by the omission of the words 'probate judge,' as the amendment; while resolution No. 10 submitted section 6 with the words 'probate judge' therein, and also the word 'assessor' added as the amendment. Thus the first amendment contains the section with the words 'probate judge' out and the word 'assessor' out, while the second amendment contains the section with the words 'probate judge' in, and the word 'assessor' in. Both of these amendments were submitted and voted upon at the same election, and both adopted. Thus, we have section 6, art. 18, amended by omitting the words 'probate judge' therefrom, and no mention made of the office of assessor as an officer who should have deputy or clerical assistance; and also by retaining the words 'probate judge,' and also inserting the word 'assessor' as an officer who might be authorized to appoint deputies. The provisions of the section thus amended are directly in conflict, and, taking the section as a whole as the amended section, *it is impossible to determine which of these two amended sections should stand as a part of the Constitution of this state. It is impossible to reconcile the two amendments, . . .*" [Emphasis added.]

In Barnett v. Case, 285 Mich. 494, 281 N.W. 12, the court refused to force a resolution to the ballot since it contained inconsistent and repugnant provisions,

"... and it is impossible by the application of any known rules of construction to determine which proposition was intended to be submitted. . . . To also print upon the ballot the question as framed by the legislature to be voted upon could lead to nothing but confusion, not only for the voter in casting his ballot, but the result of the election would be placed in the realm of conjecture."

Another even more important case is that of State ex rel Greenlund v. Fulton, Ohio, 124 N.E. 172, where there had been presented to the vote of the people an amendment providing that in raising revenues for all state and local purposes the subjects of taxation should be classified and the rate of taxation shall be uniform on all subjects of the same class, with certain exceptions. The vote upon this proposal was "yes" 336,616, and "no" 304,399. At the same election there was also submitted to the electors of the state for approval another amendment which provided that laws should be passed taxing by a uniform rule all monies, credits, investments, and bonds, with certain exceptions. This measure received a vote of "yes" 479,420, and "no" 371,176. It was contended that the latter should become law because of a similar amendment to the constitution providing that if two conflicting measures are submitted the one receiving the higher vote shall become the law. The court, in passing upon this proposition, said:

> "There is no possible misunderstanding of these provisions. The Constitution requires that every voter shall have laid before him, in as complete and effective a manner as 'may be reasonably possible,' the proposal upon which he is to vote.
>
> "In this case the petition by the electors, and the copy mailed and distributed to the electors, all contained the entire proposed section 2, art. 12, with the changes at the proper place.
>
> "As above stated, it is admitted that the provisions of the 'Classification Amendment,' requiring that the General Assembly shall classify all subjects of taxation, is in direct conflict with the provisions of original section 2, art. 12, which provide for the taxation of all property by uniform rule at its true value in money; and, having received fewer votes than the uniform rule section, it cannot be held to have carried." State v. Fulton, supra, at 176.

The Attorney General relies upon the case of Gabbert, Administrator v. C.R.I. & P. Ry. Co., supra, as supporting his position. As we previously pointed out, Gabbert set forth two separate amendments which were not in conflict. In State v. Fulton, supra, the words of the court clearly show that Gabbert does not support The Attorney General's position.

> "The case of Gabbert, Adm'r, v. C., R. I. & P. Ry. Co., 171 Mo 84, 70 S.W. 891, is relied on. In that case two amendments were proposed by the General Assembly to be voted upon by the people at the same election, and both were adopted. Both were amendments to section 28, art. 2, of the Constitution. One provided that the section should be amended by adding at a certain designated place a provision for a two-thirds verdict of a jury in civil cases not in courts of record, and a three-fourths verdict in courts of record. The other provided that at a certain other designated place a proviso should be inserted making the convening of the grand jury subject to the discretion of the court. "There was no contention that the two amendments were incongruous, or contradictory or irreconcilable, and the court, at page 95 of 171 Mo., at page 893 of 70 S.W. say:
>
> " 'Every voter, moreover, knew that if he voted for both amendments he was voting to add both to the section, and if adopted each would be added in its proposed place to the section, and the section and its amendments would then constitute a harmonious section.'
>
> "There was not in the case a single word rejected which was included in either of the proposals. It was simply found that the language in both of the proposals together constituted one harmonious whole.

> "But in this case it is proposed to reject from the proposal of the General Assembly the larger part of it, including the entire portion thereof which provides for the uniform taxation of property, and to inject into it the provisions of the initiated or classification amendment, although the former received 140,000 more votes of the electorate than the latter." State v. Fulton, supra, at 176

In order to obtain the result sought by The Attorney General the Court would be required to select the provision relating to four-year terms from Proposition 104, insert it in place of the two-year term in Proposition 108, and then reject the entire remainder of Proposition 104. Such picking and choosing of phrases is judicial legislation of the worst sort. The Supreme Court of Ohio rejected a similar suggestion in State ex rel Greenlund v. Fulton, supra, at 177, stating:

> ". . . Where is the authority of a court to add to, or subtract from, a solemn document prepared and filed pursuant to explicit terms of the Constitution for the purpose of altering the charter of the people's government? We cannot believe that the fundamental law can be taken apart, built up, amended, or dealt with, in that manner."

This Court is of the opinion that for it to so flagrantly enter the field of legislation as urged upon us by The Attorney General would be to set a precedent with far more ominous after-effects than the striking down of a conflicting amendment in the manner provided for by our Arizona Constitution. It is obvious that the provisions of Proposition 104 and Proposition 108 are in complete and irreconcilable conflict.

There are several ways in which the Legislature might have proposed these amendments without involving such conflict, none of which were followed.

It is not necessary to discuss the effect of Chapter 89 of the 1968 Arizona Session Laws, since such Chapter, by its own terms, does not become effective ". . . until the Constitution of Arizona is amended by vote of the people abolishing the office of state auditor," nor could it be given effect independent of such an amendment. Hudson v. Kelly, 76 Ariz. 255, 263 P.2d 362. We therefore hold that since Proposition 104 received the larger number of votes it became the law; that Proposition 108 has not been adopted, and did not become a part of the Constitution of Arizona.

It is the judgment of this Court that the respondent, Jewel W. Jordan, now legally holds office as State Auditor, and, a certificate of election having been issued to her by the Secretary of State certifying her election as State Auditor on November 5, 1968, is entitled to continue to hold such office for a two-year term, commencing the first Monday in January 1969.

Ernest W. McFarland, Chief Justice

CONCURRING:

Charles C. Bernstein, Justice
Lorna E. Lockwood, Justice

STRUCKMEYER, Justice, and UDALL, Vice Chief Justice (Dissenting)

This action in quo warranto can and should be resolved by the simple and usual principles customarily applied to constitutional interpretations. Because it has not been so resolved we are compelled to dissent.

The two proposed constitutional amendments passed by affirmative vote at the general election of November 5, 1968, relate to Art. V, § 1 of the Constitution of Arizona. In their relevant parts, they are:

"Proposition #104

"Section 1. The Executive Department shall consist of Governor, Secretary of State, State Auditor, State

> Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for four years beginning on the first Monday of January, 1971 next after the regular general election in 1970."

and Proposition #108:

> "Section 1. The Executive Department shall consist of Governor, Secretary of State, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for two years beginning on the first Monday of January next after his election."

The majority of this court conclude from a comparison of the two propositions that they conflict. This is because Proposition #104 includes the State Auditor as an office of the Executive Department and Proposition #108 excludes that office. However, this seeming conflict disappears when the two propositions are compared with Art. V, § 1 as it was prior to November 5, 1968, and the relevant law is applied in the light of the language used.

Since statehood in 1912, and until the general election of November 5, 1968, the Constitution of the State of Arizona Art. V, § 1, paragraph 1 has provided:

> "Section 1. The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for two years beginning on the first Monday of January next after his election."

It will be immediately noticed that while Art V, § 1 consists of one sentence, structurally it has two distinct clauses, hence it is divisible into two severable parts. The first clause, by the language "The executive Department shall

consist of the Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Superintendent of Public Instruction," established the enumerated offices as constitutional offices. The second clause, by the language, "each of whom shall hold his office for two years beginning on the first Monday of January next after his election," established their terms of office.

Proposition #104 purports to change the existing Art. V, § 1 only in its second clause; that is, that the terms of the offices shall be for four years after the first Monday of January, 1971, instead of two years as was formerly. Proposition #108 purports to change Art. V, § 1 only as to the first clause in that it deletes the office of State Auditor as a constitutional office, thereby abolishing that office. It is abundantly clear that the purpose in submitting the two proposed amendments in this manner was to permit the people to decide each proposal separately vis-a-vis whether the terms of the executive department would be increased to four years and whether the office of the State Auditor would be abolished.

The propositions as submitted to the electorate conform to the holding of this court in Kerby v. Luhrs, 44 Ariz. 208 at p. 221, 36 P.2d 549:

> "* * * if any one of the propositions, * * * is not such that the voters supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted,* * * *."

The legislature, in submitting two propositions, avoided what is commonly known as "logrolling." Either the first or the second clauses of Art. V, § 1 could be changed or both or no change at all could be made but if the amendments were incorporated into one, the voters would have had no choice but to either accept or reject both of the proposed changes. The legislative objective is laudable and

commendable. It should not be permitted to thwart the majority wishes of the voters in the democratic state of Arizona, rather every effort should be made to find the purposes of the amendments and apply them as written.

It is, of course, the prime aim of constitutional construction to arrive at the apparent purpose of an enactment. We said, for example, in construing another article of the Arizona Constitution:

> "* *.* there are two of the canons of constitutional construction which seem peculiarly applicable. The first and most important one is that the construction should be such as to accomplish the apparent purpose of the provision. * * *" Porter v. Hall, 34 Ariz. 308, 321, 271 p. 411.

The purpose should be determined from a reasonable and fair interpretation of the language used. See e.g. In re Morris' Estate, 56 Cal.App.2d 715, 133 P.2d 452; Wolfson v. Avery, 6 Ill.2d 78, 126 N.E.2d 701; Lincoln v. Secretary of Commonwealth, 326 Mass. 313, 93 N.E.2d 744; In re Fay, 291 N.Y. 198, 52 N.E.2d 97.

This is everywhere the approved mode of constitutional construction and bears repeating. *The court seeks to determine the purpose of the constitutional enactment and in arriving at the purpose looks to the language used.*

A close scrutiny of the language used in the propositions and a comparison with the language of Art. V, § 1 as it existed before amendment makes the purposes of the two propositions clear and obvious. *Each was designed to permit the electorate to accept or reject one change only.* It is wholly unreasonable to assume from a superficial examination of the two propositions, as the majority do, that the purpose of one was to cancel the other if both passed by affirmative votes; that is to say, that the two-year term in Proposition 108 was to cancel the four-year term in Proposition 104.

The majority treat but lightly the principle that constitutional provisions only are in conflict when they relate to the same subject, are adopted for the same purposes, and cannot be enforced without creating conflicts.

> "Distinct provisions of the constitution are repugnant to each other only when they relate to the same subject, are adopted for the same purposes, and can not be enforced without material and substantial conflict." Meyers v. Flournoy, 209 La. 812, 25 So.2d 601, 603.

When the two proposed amendments are read in the light of the divisible and severable nature of the two clauses found in Article V, Section 1, it is plain that they do not relate to the same subject. The subject of Proposition 104 relates to the second clause of Article V, Section 1—that part providing for the terms of office. The subject of Proposition 108 relates to the first clause—that part enumerating the offices.

Neither do they have the same purposes. Purpose means the effect or result aimed at. Webster's Third New International Dictionary Unabridged. The result aimed at by each of the proposed amendments is distinct and dissimilar. Each seeks to change the Constitution in a single different respect. Moreover, each can be enforced without creating a conflict simply by giving to each the meaning attributable to the purposes found in the language used.

It is also an accepted principle that one part of a Constitution is not to be allowed to effect another, if by any reasonable construction the two can be made to stand together. McBride v. Kerby, 32 Ariz. 515, 521, 260 P. 435. An interpretation which is reasonable and consistent with common sense should be applied and "A construction which will result in an absurdity should be avoided." McBride v. Kerby, supra. Under the majority's interpretation, Proposition 108 is wholly ineffective and nugatory and the will of the majority of those voting is defeated, whereas by the

construction which we believe proper, a reasonable and sensible interpretation is accorded which gives effect to both amendments.

For the foregoing reasons we dissent.

FRED C. STRUCKMEYER, Jr., Justice

JESSE A. UDALL, Vice Chief Justice

APPENDIX C

IN THE SUPREME COURT OF ARIZONA

No. 9480

STATE OF ARIZONA, ex rel., THE ATTORNEY GENERAL,

GARY K. NELSON, Petitioner,

v.

JEWEL W. JORDAN, Respondent.

Motion for Rehearing, Review, and/or Revision

Comes now the petitioner, pursuant to Rule 9, Rules of the Supreme Court, 17 A.R.S. and pursuant to Art. 6, § 5, Constitution of Arizona, 1 A.R.S., and moves this court to rehear, review, and/or revise its decision handed down in this cause on December 31, 1968, for the following grounds and reasons:

CONFLICT V. INTENT

It seems clear to the petitioner that the decision of this court, as now written, finds conflict where no conflict exists or was intended to exist, and thus violence to the basic concepts of constitutional construction, universally recognized, of giving effect to the intent of the people wherever discernible, of giving effect to construction which would accomplish the clear purpose of the provisions, and of harmonizing all provisions of the Constitution. *Clark v. Boyce,* 20 Ariz. 544, 185 P.136; *McBride v. Kerby,* 32 Ariz. 515, 260 P. 435; *Porter v. Hall,* 34 Ariz. 308, 271 P. 411; *County of Apache v. Southwest Lumber Mills, Inc.,* 92 Ariz. 323, 376 P.2d 854.

In addition, by the use of wooden literalism, and by citing cases of questionable authority and by misconstruing the decision most clearly in point with our situation here, the court has thwarted the efforts of the legislature and the

people to carefully comply with the sound, landmark decision of *Kerby v. Luhrs,* 44 Ariz. 208, 36 P.2d 549.

A review of the three decisions which are apparently the underpinnings of the majority opinion, clearly indicates that the result reached by the dissent is the correct one. In *McBee v. Brady,* 15 Ida. 761, 100 P.97, the truly determinative question was a *Kerby v. Luhrs* issue and not a conflict in amendments, separately approved. In *McBee* there was only *one* amendment prepared which purportedly repealed two sections of one article of the Colorado Constitution while at the same time amending five sections of two articles. This is clearly the main thesis of the opinion and the discussion concerning conflicts really relates to a discussion of conflict within *one* amendment and is used to stress the need for submitting separate amendments, such as was required by the Colorado Constitution, such as has always been the law in this state, *Kerby* v. *Luhrs, supra,* and as was done in this particular instance.

The decision of *State ex rel. Greenlund v. Fulton,* (Ohio 1919) 124 N.E. 172, even more heavily relied upon by the court, is simply not any authority, direct, persuasive or otherwise, for the position of the court in the case at bar. The decision was a 4-3 decision, with there being three opinions written by the majority justices. The opening paragraph of one of the concurrences makes it unmistakably clear that the decision does not rest upon the premise of conflicting amendments.

> "I concur in the judgment in this case, *not upon the ground that the amendment proposed by initiative petition is in conflict with the amendment proposed by the joint resolution of the General Assembly,* but upon the ground that the initiated amendment, . . . was not validly submitted, and therefore was not legally adopted." State ex rel *Greenlund* v. *Fulton,* supra, 124 N.E. at 177.

This leaves the court with the one decision, cited in both *McBee* and *Fulton*, supra, which controls the case at bar, *Gabbert v. Chicago, R. I. & P. Ry Co.*, 171 Mo. 84, 70 S.W. 891. Nothing would be served by restating what was set forth in petitioner's original memorandum in this case as it relates to *Gabbert* and its impact, but we request the court to consider the same as incorporated in this motion by reference. The court simply cannot dismiss *Gabbert* by saying the amendments there were not in conflict. They were in the same sort of "conflict" that the two amendments before this court are supposedly in conflict, in the unnecessary reprinting of the old parts of the section not intended to be changed by that particular proposition. A proper reading of this case must lead the court to a different conclusion.

STARE DECISIS

If this decision is left as it is, it presumably will become, at least prima facie, a valid precedent for future decisions, e.g., *Inspiration Consolidated Copper Co.* v. *Conwell*, 21 Ariz. 480, 190 P.88; *Sligh* v. *Watson*, 67 Ariz. 95, 191 P.2d 724; *White* v. *Bateman*, 89 Ariz. 110, 358 P.2d 712; *In re: Estate of McConnell*, 101 Ariz. 538, 421 P.2d 895.

If this be so, then at least two other propositions passed by the people in the November 5, 1968 general election are in jeopardy. Propositions 100, 101, and 102, all dealing with taxation, and all amending parts of Section 2 of Article 9 of the Arizona Constitution (see Exhibits A, B, and C of petitioner's original petition) were drafted, as were Propositions 104 and 108, so as to be in a position to stand or fall separately or in any combination, *when compared to the Constitution as it stood prior to November 5, 1968.* In each case the full section was reprinted with only those changes to be voted upon in each separate proposition. Undoubtedly these issues will have to be fully litigated, if this opinion stands as written.

Since this court has not hesitated in the past to overrule or disapprove prior decisions which were not securely founded, e.g., *Crane Co.* v. *Arizona State Tax Commission,* 63 Ariz. 426, 163 P.2d 656, 163 ALR 261, *State* v. *Allred,* 67 Ariz. 320, 195 P.2d 163, 4 ALR 735; *Stone v. Arizona Highway Commission,* 93 Ariz. 384, 381 P.2d 107; see also *State Tax Commission* v. *Ryan-Evans Drug Stores,* 89 Ariz., 18, 357 P.2d 607, it is not impossible, or even improbably, that when the question of the efficacy of propositions 100, 101, and 102 comes before this court, the court will reverse itself, and give effect to the propositions as the clear will of the people. Arizona jurisprudence would then be faced with the unpleasant picture of having given effect to one set of propositions passed by the people on November 5, 1968, while denying their will in another case where the legal issues were identical and should have produced the same results. Such an occurrence should not be allowed to happen.

CONCLUSION

The court is thus presented with an opportunity, perhaps unusual but not unique, (Davis v. Brittain, 89 Ariz. 89, 358 P.2d 322, opinion changed on rehearing, 92 Ariz. 20, 373 P.2d 340), to correct its error even before that error has become final in its own decision. The petitioner urgently requests this court to reopen this matter and render its decision giving effect to both propositions 104 and 108 as passed by the people on November 5, 1968, and clearly reflecting their will and intentions.

Respectfully submitted,

/s/ Gary K. Nelson
GARY K. NELSON
The Attorney General

APPENDIX D

SUPREME COURT, STATE OF ARIZONA

No. 9480

STATE OF ARIZONA, *ex rel,* THE ATTORNEY GENERAL, GARY K. NELSON, *Petitioner*

vs.

JEWEL W. JORDAN, *Respondent*

Objections To Motion for Rehearing

Comes now Jewel W. Jordan, Respondent in the above entitled cause, and objects to the granting of the Motion for Rehearing, upon the following grounds and for the reason:

I.

There is no provision in the Rules of the Supreme Court for rehearing decisions by the Court in exercising its original jurisdiction. No authority, or opinion is cited, and no Rule of the Court authorizing a rehearing in *habeas corpus, Mandamus* or *Quo Warranto* proceedings.

The Attorney General states the petition is filed under Rule 9 of the Rules of the Supreme Court. Rule 9 provides any party desiring a rehearing shall have 15 days following the notice given pursuant to *Rule 8.* Rule 8 provides that following a decision, or order, made *in any appeal,* the Clerk of the Supreme Court shall give notice, and that any party may within 15 days apply for rehearing. This proceeding is not an appeal.

The authority cited, Davis vs Brittian, 92 Ariz 20, was a motion for rehearing in a case on appeal.

Rehearings, like appeals, are statutory, or governed by the Rules, and without either a statute, or Rule of the Court the petition is without authority.

Counsel cites no precedent. This court has never granted a rehearing in a habeas corpus, Mandamus or Quo Warranto proceeding.

ARGUMENT IN SUPPORT OF OBJECTION NO. I.

An application for a Writ of Quo Warranto initiated in our Supreme Court under Art. 6, #5 of the Constitution is, for all intents and purposes, an original civil proceeding. The major difference between lower court proceedings is that, if there are questions of fact the Supreme Court will send the matter to a Superior Court for findings upon which it will be returned for final determination. Perkins v. Manning, 59 Ariz 60 at 64; Donaldson v. Sisk, 57 Ariz. 318 at 329.

Supreme Court Rule 9, permitting motion for rehearing, by virtue of its reference to Rule 8 would apply only to decisions rendered in the exercise of the Court's Appellate jurisdiction.

RULE 8. Notice of Decisions and Orders

When a decision is given or an order made *in any appeal,* the clerk of this court shall forthwith give notice thereof in writing to the attorneys of record of the respective parties. Notice shall be given by depositing the written notice in the post office, postage prepaid, addressed to the respective attorneys of record. If the place of business or residence of such attorneys is unknown, notice shall be given to the respective parties. One copy of the decision shall at the time of giving notice be mailed to one of the attorneys of record for appellant and to one of the attorneys of record for appellee.

RULE 9. Motion for Rehearing

9(a) Filing; service; amendment. Any party desiring a rehearing may, within fifteen days *after the clerk has given the notice provided by Rule 8* that a decision has been rendered by this court, file a motion in writing for a rehearing specifying the particular grounds for rehearing. A copy of such motion shall be served upon the adverse party or his attorney. A motion for rehearing shall not be amended except by leave of Court.

Therefore, if a party desires reconsideration of a decision of the Supreme Court in the exercise of its original jurisdiction, he would have to move for a new hearing under Rule 59 (a) of the Rules of Civil Procedure (16 A.R.S. at p. 590) and only upon a showing of one of the grounds therein specified.

RULE 59. New trial; amendment of judgment

59(a) Procedure; grounds. A verdict, decision or judgment may be vacated and a new trial granted on motion of the aggrieved party for any of the following causes materially affecting his rights;

1. Irregularity in the proceedings of the court, referee, jury or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial.

2. Misconduct of the jury or prevailing party.

3. Accident or surprise which could not have been prevented by ordinary prudence.

4. Material evidence, newly discovered, which with reasonable diligence could not have been discovered and produced at the trial.

5. Excessive or insufficient damages.

6. Error in the admission or rejection of evidence, error in the charge to the jury, or in refusing instructions requested, or other errors of law occurring at the trial or during the progress of the action.

7. That the verdict is the result of passion or prejudice.

8. That the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law.

Although our Supreme Court has not promulgated a rule relating to procedure to be used in a case invoking its original jurisdiction, reference to the U.S. Supreme Court is meaningful on this point since Arizona bases its Civil Procedure on Federal Practice.

SUPREME COURT RULES RULE 9

PART III. ORIGINAL JURISDICTION

RULE 9. Procedure in original actions

1. This rule applies only to actions within the original jurisdiction of the court under the Constitution. Original applications for writs in aid of the court's appellate jurisdiction are governed by Part VII of these rules.

2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

While we have found no case in point, it would seem that a party seeking reconsideration of a U.S. Supreme Court decision in an original action would move for a rehearing under Rule 59 of the Federal Rules of Civil Procedure (28 U.S.C.R.)

RULE 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) *in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted* in suits in equity in the courts of

the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

rather than under U.S. Supreme Court Rule 8 (28 U.S.G.A.).

RULE 58. Rehearings

1. A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof. Such petition must briefly and distinctly state its grounds; it must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay; it must be printed in conformity with Rule 39; and forty copies, one of which shall bear the manuscript signature of counsel to the certificate, must be filed, accompanied by proof of service as prescribed by Rule 33. A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.

In State v. Northrup, 367 S.W. 2d 512 (Mo.) the Missouri Supreme Court said:

(3-5) Quo warranto proceedings are civil actions at law. State ex inf. McAllister ex rel. Cole v. Norborne Land Drainage Dist. Co., of Carroll County, 290 Mo. 91, 234 S.W. 344, 347 (1); State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S.W. 2nd 941, 946(12), 119 A.L.R. 710; State ex inf. Mallett ex rel. Womach v. City

of Joplin, 332 Mo. 1193, 62 S.W. 2nd 393, 398(2). "A new trial may be granted in a quo warranto proceeding on the same grounds and on the same grounds and on the same showing as in civil cases generally." Quo Warranto, 74 C.J.S. #47; People ex rel. Dickinson v. Sackett, 14 Mich. 243, 247. So far as here involved, our Rules of Civil Procedure (Rules 41 to 102, inclusive) govern the practice and procedure in all proceedings of a civil nature in the circuit courts, the courts of appeals and the Supreme Court. Civil Rules 41.01 and 41.02, V.A.M.R. Consult RSMo 1959, V.A.M.S., #506.010.

The above ruling referred to a petition for a new trial in a lower court. Missouri does not have the prolem of rehearings or new trials on applications for original writs in their Supreme Courts by virtue of Rule 83.22 of Missouri Rules of Civil Procedure: "Motions for reconsideration of the court's action in refusing applications for original writs shall not be filed." It leaves unsaid what the procedure would be in the event the court grants the writ, but it would probably be the same as our position here. Missouri Rule 83.16 provides a motion for rehearing be filed 15 days after the court's *opinion* is filed and Rule 78.02 requires a motion for a new trial be filed 15 days after *entry of judgment.* Our Arizona rules also make this distinction (Supreme Court Rule 9 and Rule 59(d) of Rules of Civil Procedure). However, in view of the importance of the matter involved, we have ignored the technicality and considered the motion.

It is difficult to see how the Attorney General can succeed in his quest for reconsideration under either Rule. If he seeks a new trial, the only conceivable grounds would be under Rule 39a(8) that the "judgment is not justified by the evidence or is contrary to law." But Rule 59(c) provides that on such grounds "the court shall review the sufficiency of the evidence" of which there is no question in the Jordan case. Even if he would be entitled to apply for rehearing under Rule 9, to reconsider the law, it should be denied

based on Justice Struckmeyer's opinion in Climate Control, Inc. v. Hill, 87 Ariz. 201 at 205 where he rejected mere reargument of the initial position as grounds for a rehearing.

> (5) Finally, appellant has advanced other grounds for reversing this court's decision. They consist primarily of a reargument of its initial position. By long-established rule of court they are not grounds for reconsideration. Copper Queen Mining Co. v. Arizona Prince Copper Co., 2 Ariz. 169, 11 P. 396.

II.

The Attorney-General's motion for rehearing is premised upon two propositions.

First, it is stated, there is a conflict between the decision of the Court and the INTENT of both the Legislature and the voters, and that by the use of *"wooden literalism"* the Court has thwarted the efforts of the Legislature and the people to abolish the office of State Auditor.

Second, by reason of Stare Decisis, grave consequences will result if this precedent is allowed to stand because there are other amendments, relating to property exemptions, adopted at the same election. The grave consequences resulting is that propositions 100, 101 and 102 are in jeopardy; that when propositions Nos. 100, 101 and 102 come efore the Court the court will have to reverse itself in the instant case.

As to the First proposition, that by wooden literalism the court has thwarted the will of the legislature and the people.

This was thoroughly argued, considered by the Court, and dismissed by the decision of the Court, the majority opinion stating "to discover a different INTENT of the electors, it would be faced with an insurmountable task."

The dissenting opinion also gave consideration to the matter of intent, but called it the "purpose" of the enactment, and stated "in arriving at the 'purpose' the Court *looks at the language.*"

REHEARINGS

Rehearings are not granted, as stated by the Court, in the early case of *The Copper Queen vs Arizona Price Copper Co.,* 2 Ariz 169 (11 Pac 396) for the purpose of re-argument of the initial or original position of the party. In that case it was stated:

> "We are, in effect, asked to review a decision of this court. This we decline to do. It is not the office or purpose of rehearing to reopen the whole case, and to require the court a reconsideration of the whole case. Were this precedent to be established, it would open the doors for petitions for rehearing in all causes and we should expect this more particularly *when the persons who compose the court have been changed.*"

The judgment of the Court, in reaching its decision in the original case, was reached after oral arguments, on parts of two different days. These arguments were not heard by the new Justice. The information contained in the Motion for rehearing, furnishes little information for basing a judgment to reverse the courts original judgment. It is unfair to the new Justice to expect a considerate judgment of the whole case based on the information furnished in the petition for rehearing.

It is not the office or purpose of a rehearing to reopen the whole case. (See Climate Control, Inc. vs Hill, *87 Ariz. 201.)*

Under the caption, "Conflict vs Intent" the Attorney General urges that the decision of the court failed to give effect to the intent of the people.

In support of this thesis, counsel then re-argues the same authorities presented in the original presentation, and urges a proper reading of those authorities.

In the original opinion, both the majority and dissenting opinions, intent was fully considered in the light of the language used in the amendments.

It was determined that the intent of the electorate was expressed by giving more votes to retain the office of State Auditor, with a four year term, than was given to abolish the office, and giving the other members of the executive department only two year terms.

STARE DECISIS

The second ground urged for granting a rehearing, because of the rule of stare decisis, the Court may ultimately be faced with litigation with reference to the validity of other amendments adopted at the same election, Propositions Nos. 100, 101 and 102.

The law applicable to one state of facts does not necessarily apply to another state of facts. It may or may not be stare decisis. The Court may find there is no conflict because of the exemption given veterans, widows, and the exemption of household goods.

There is a vast distinction between "conflicting" measures and a provision containing different subject matters as 100, 101 and 102. One is governed by Paragraph 12 of Art 4, Pt 1, Sec. 1, and the other is subject to the provision of *Section 1, Article XXI,* relating to different subject matters.

This distinction was pointed out in the case of Kerby vs Luhrs 44 Ariz. 208, at page 221, in stating:

> "But if any one of the propositions, *although not directly contradicting the others,* x x x then there are in reality two or more amendments x x "

When there are more than one suject matter in a single measure it is bad and the Court by an injunction may prohibit its submission to the voters, but if two or more measures, on the same subject are contradictory, they may be submitted, and the one receiving the greatest number of votes shall be valid.

We know of no reason why we should examine in the instant case or the Court examine other amendments, pro-

posed at the same election, to determine how the Court should decide in the instant case.

It might as well be argued that if both 104 and 108 are adopted there will be a controversy, and an issue, come 1971, whether the Governor is elected under 104 for a 4 year term or under 108 for a two year term. There will surely be a public discussion of this question, and someone may ask the court for a decision, but this issue should not now influence a decision in the instant case, just because there is liable to be future litigation.

III.

Conflicting Opinions

Rehearing is requested by petition not because of the conflict between the Majority and dissenting opinions, or that the Majority opinion based its decision upon Par. 12, of Article 4, and the dissenting opinion based its conclusion upon Section 1 of Article XXI.

The conflict between Proposition Nos. 104 and 108, says the dissenting opinion, "disappears," when the "relevant law is applied in the light of the language used."

In other words, the dissenting opinion concedes the *conflict*, but submits it disappears when the rule of *Kerby vs Luhrs* is applied, that is, that there may be but one subject matter in a single measure, to prevent "log-rolling."

The "relevant law" as applied by the majority opinion, resolves the conflict in accordance with Paragraph 12 of Art 4, Pt 1, Sec 1. and the dissenting opinion applies as the "relevant law" that provision of the Constitution that but one subject matter may include a single subject.

The dissenting opinion states:

> "When the two proposed amendments are read in the light of the divisible and severable nature of the two clauses found in Article V, Section 1, it is plain that they do not relate to the same subject."

There are two subject matters, says the dissenting opinion, for the reason that the first part of the sentence is divisible from the second part of the sentence. The second part of the sentence only is in conflict, in that 104 relates to the term of office, as four years, while the proposition 108 relates to the term of office as two years. The dissenting opinion overlooks that the first part of the sentence is also in conflict in that the Proposition 104 retains the office of Auditor, and the 108 repeals the office of State Auditor.

Statutes creating offices usually fix the term in the same sentence, as for example the late statute creating an Industrial Commission, consisting of five members, fixes their term in the same sentence: "Stare Decisis" certainly would not require this court to hold all such public officials are holding office unconstitutionally.

It is not the dividing of the sentence that creates two different subject matters. If a single sentence contains two different subject matters it is just as bad, constitutionally, as if the different subjects were in two sentences.

In Kerby Vs Luhrs the two subject matters that made the measure unconstitutional was a provision for taxing the mines at the rate of one-half cent a pound, and the Public Utilities were to be taxed at a value filed by the utilities with the Corporation Commission for rate making purposes. Whether these two subject matters were in one sentence or divided into two sentences would not affect the prohibition against legislating two subjects in one measure, condemned as "log-rolling."

After dividing the sentence creating the six man Executive Department in Proposition No. 104, and dividing the sentence in Proposition No. 108, creating a five man Executive Department, we have a conflict as to the number of persons that shall constitute the Executive Department.

In 104 we have retained the State Auditor, and in 108 we have abolished the office.

After dividing the second part of the sentence, the same conflict exists as to the term of office. Under Proposition

No. 104 the term of office is Four years, and under Proposition 108 the term is limited to two years.

If, the applicable law to make the conflict "disappear" is that there are two subject matters in 104, then if the rule in Kerby vs Luhrs is applied, Proposition 104 is unconstitutional and the conflict, of course, disappears. The same rule should apply to Proposition 108. Here as in 104 the Executive Department is created in the first sentence, and the term of office is two years in the second sentence.

The dividing of the sentence into two parts, in order to create two subject matters, does not do justice to Judge Struckmeyer's analytical mind for the reason he concludes that both measures are constitutional and enforceable.

"Wooden Literalism"

It is not wooden literalism for the majority of the court to apply as the applicable law, the constitutional mandate for resolving conflicting measures. It is wrong to substitute a formula that avoids a constitutional mandate.

The dissenting opinion acknowledges, and confesses the conflict when it states this conflict can be made to "disappear" by substituting a formula that differs from that of the Constitution. Any change in sentences, words or language, by the judiciary, that changes the constitutional provision, is judicial legislation and unconstitutional.

Section 32 of Article II of the Constitution provides:

> "Provisions of this constitution are mandatory, unless by express words they are declared otherwise."

The mandate in the instant case is that when two or more measures are in conflict the court shall declare the one receiving the greater number of affirmative votes as the measure adopted.

Webster's Dictionary defines the word "wooden" as "stupid", "stiff", "clumsey" and the word "literalism" as "following the letter, or literal sense."

We respectfully submit the majority opinion in giving literal interpretation to the constitutional mandate were not engaged in, or motivated by wooden literalism.

Respectfully submitted,

/s/ R. G. Langmade
R. G. LANGMADE
Attorney for Respondent,
4802 E. Van Buren
Phoenix, Arizona 85008

APPENDIX E

SUPREME COURT, STATE OF ARIZONA

No. 9480

STATE OF ARIZONA, *ex rel* THE ATTORNEY GENERAL, GARY K. NELSON. *Petitioner*

VS

JEWEL W. JORDAN, *Respondent*

Supplemental Objection To Motion for Rehearing

Comes now JEWEL W. JORDAN and respectfully submits a Supplemental Objection to the granting of a Motion for Rehearing in the above matter.

As we previously pointed out on Page 1 of our Objections to the Attorney General's Motion,

> "There is no provision in the Rules of the Supreme Court for rehearing decisions by the Court in exercising its original jurisdiction. No authority, or opinion is cited, and no Rule of the Court authorizing a rehearing in *habeas corpus, Mandamus or Quo Warranto* proceedings."

THEREFORE, should this Court grant the motion of the Attorney General, it would be a procedure not authorized by the respondent's rights, without due process, in violation of the Fourteenth Amendment to the United States Constitution and under Article 2, Section 4 of the Constitution of the State of Arizona.

Any decision on the merits of this case other than the existing one filed by this Court would give rise to a Federal question that the respondent was deprived of her office by

an arbitrary application of a State Constitutional Amendment in the face of another Amendment which preserved that office to her.

Respectfully submitted,

/s/ R. G. Langmade
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Office-Supreme Court, U.S.
FILED
AUG 4 1969
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted] 204

JEWEL W. JORDAN,

Appellant,

v.

STATE OF ARIZONA, Ex Rel.
GARY K. NELSON
The Attorney General,

Appellee.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION

On Appeal from the
Supreme Court of Arizona

GARY K. NELSON
Attorney General of Arizona
Rm. 159 State Capitol Bldg.
Phoenix, Arizona 85007

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1489

JEWEL W. JORDAN,

Appellant,

v.

STATE OF ARIZONA, Ex Rel.
GARY K. NELSON
The Attorney General,

Appellee.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION

On Appeal from the
Supreme Court of Arizona

GARY K. NELSON
Attorney General of Arizona
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Phoenix, Arizona 85007

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MOTION TO DISMISS
AND BRIEF IN SUPPORT OF MOTION

COMES now the appellee herein, by and through the Attorney General of Arizona, GARY K. NELSON, pursuant to Rule 16, Rules of the Supreme Court, 28 U.S.C., and moves this Court to dismiss the appeal heretofore filed in this cause for the following grounds:

1. This cause does not present to the Court a substantial federal question.

2. The federal question sought to be reviewed here was not timely raised in the court below.

3. The decision of the Supreme Court of the State of Arizona clearly rests on an adequate non-federal basis.

OPINIONS BELOW

The opinions below are fully and accurately set out as Appendices A and B of appellant's jurisdictional statement herein. The full citation to the decision is: State Ex Rel. Nelson v. Jordan, 104 Ariz. 90, 449 P.2d 18 (1968), on rehearing, 104 Ariz. 193, 450 P.2d 383 (1969).

STATEMENT OF THE CASE

Appellant, in her jurisdictional statement, pages 3 to 24, has presented, interspersed with mixed statements of fact and law and argument, a relatively accurate portrayal of the factual matters leading up to this appeal. For purposes of this motion, appellee accepts the factual material set out by appellant and, for the convenience of the Court,

summarizes it as follows:

1. During the Second Regular Session of 28th Legislature of the State of Arizona, two constitutional amendments, among others, were proposed and referred to the people of the State of Arizona according to law for their acceptance or their rejection. One amendment, House Concurrent Resolution 1, which became Proposition 108 on the General Election Ballot on November 5, 1968, proposed the abolishing of the Constitutional office of State Auditor; the other amendment, Senate Concurrent Resolution 6, which became Proposition 104 on the General Election Ballot, proposed that all constitutional state officers be given four year terms, starting with the term to be voted on in the

fall of 1970. Because of the eventuality that the people might not fully accept the Legislature's efforts at governmental reorganization, appellant, a long time and very popular officeholder in this state, filed and ran in the November election of 1968 for the office she had held for so many years. Both propositions passed, and appellant, running unopposed, received all of the votes cast for State Auditor.

2. After an abortive effort by the appellant to bring this matter before the Arizona Supreme Court prior to the technical completion of all the election processes of 1968, (Jordan v. Williams, unreported, #9465, Arizona Supreme Court, Petition for Writ of Prohibition and Certiorari, denied, November 27, 1968)

a petition for Writ of Quo Warranto was brought by appellee on December 5, 1968, with the results as outlined in Appendices A through E in appellant's jurisdictional statement.

ARGUMENT

NO SUBSTANTIAL FEDERAL QUESTION

Appellant asserts in her jurisdictional statement that the granting by the Arizona Supreme Court of a rehearing on an original proceeding in Quo Warranto before that court denied appellant due process of law under the Fourteenth Amendment of the United States Constitution.

The decision of this Court in Snowden v. Hughes, 321 U.S. 1 (1944), as pointed out by appellant in her jurisdictional statement, answers this allegation "with

a resounding 'No.'" The Snowden case involved an action in the federal courts for damage for infringement of the plaintiff's civil rights in violation of the Fourteenth Amendment. Plaintiff was one of several candidates for nomination for representative in the Illinois General Assembly. Although plaintiff received sufficient votes in the primary election for nomination, the Canvassing Board wrongfully refused to certify his name as required by state law. The United States Supreme Court sustained the dismissal of the action, stating at p. 7:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. Taylor & Marshall v.

Beckham, 178 U.S. 548. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, Cave v. Newell, 246 U.S. 650, as we reaffirm now."

The Court in Snowden also cited with approval Wilson v. North Carolina, 169 U.S. 586 (1898), pp. 594-5:

"In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and the terms upon which it shall be held by the person filling the office. . . .

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without

> due process of law or by denying him the equal protection of the laws."

See also Taylor v. Beckham, 178 U.S. 548 (1900); Elder v. Colorado, 204 U.S. 85 (1907).

The Snowden case has been consistently followed by this Court and by other courts. See, e.g., Egan v. City of Aurora, et al., 365 U.S. 514 (1961) (Per Curiam); Borne v. Jones, 147 F.2d 1008 (5th Cir., 1945) (Per Curiam); Byrd v. Sexton, 277 F.2d 418 (8th Cir., 1960); Bynum v. Burns, 379 F.2d 229 (8th Cir., 1967); Application of Wyckoff, 196 F.Supp. 515 (S.D. Miss., 1961); Bacon v. Holzman, 264 F. Supp. 120 (N.D.Ill., 1967); Gentry v. Howard, 288 F.Supp. 495 (E.D. Tenn., 1968); Coffelt v. Bryant, 238 Ark. 363, 381

S.W.2d 731 (1964).

Appellant argues that Baker v. Carr, 369 U.S. 186 (1962) "conflicts" with Snowden and indicates that the United States Supreme Court would have jurisdiction over "political areas", including this one. Baker v. Carr is clearly distinguishable. The Court there found that an equal protection clause challenge to state legislative apportionment presented no political question. Ibid., 369 U.S. at pp. 209, 217. The Court in Baker cites Snowden in support of the proposition that if discrimination is properly shown, the right to relief under the equal protection clause is not diminished by fact that the discrimination relates to political rights. Ibid., 369 U.S. at p. 210. Thus, even conceding that

certain "political questions" are justiciable, Snowden nevertheless stands for the proposition that even an unlawful denial by state action of a right to state political office is not a denial of a right secured by the due process clause of the Fourteenth Amendment. Thus, even if the Arizona Supreme Court wrongfully allowed the motion for rehearing (which action appellee asserts was valid and proper in all respects), Snowden precludes the finding of a substantial federal question.

Quite apart from the Snowden doctrine, this Court has held that the determination by a state court of its conception of the rules of pleading, as expounded in previous decisions of the state court, does not involve a federal question. Delmar Jockey

Club v. Missouri, 210 U.S. 324 (1908). The Supreme Court there dismissed a writ of error from the forfeiture in the state court of a corporate franchise by quo warranto proceedings, and held that the asserted federal questions were so devoid of merit as to constitute no basis for the writ of error even if the state court had erred in its conclusions.

A decision by the state court on a matter of local pleading or practice is ordinarily given conclusive effect. John v. Paullin, 231 U.S. 583 (1913); United Gas Public Service Co. v. Texas, 303 U.S. 123 (1938). In the instant case, appellant is challenging the ruling of the Arizona Supreme Court, based on its own prior decisions, that it has in-

herent power to grant a rehearing on cases it has heard under its original jurisdiction of extraordinary writs, which is purely a matter of local pleading or practice.

POTENTIAL FEDERAL QUESTIONS NOT TIMELY RAISED

The attempt to raise the alleged federal question was so much of an afterthought that it must have been based upon some novel theory that a litigant need not raise allegedly federal questions, in spite of the opportunity to do so, until it becomes apparent, either by hunch or more reliable information, that he may lose on the theories he had theretofore advanced. (See Appendices D and E of appellant's jurisdictional statement.)

Such is now the law, and the attempt to raise the alleged federal question is clearly not timely. Henry v. Mississippi, 379 U.S. 443 (1965); Hanson v. Denckla, 357 U.S. 235 (1958).

STATE COURT DECISION RESTED ON ADEQUATE STATE GROUNDS

Even if a federal question had been properly raised and determined in the Arizona Supreme Court, this Court will not take jurisdiction when the determination of the cause below rested on adequate state grounds. Murdock v. Memphis, 87 U.S. 590 (1874); Klinger v. Missouri, 80 U.S. 257 (1871); Neilson v. Lagow, 53 U.S. 98 (1851).

Thus, in Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945), the Court said:

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of Federal laws, our review could amount to nothing more than an advisory opinion. . . ."

Ultimately, the decision of the Arizona Supreme Court rested upon construction of two amendments to the Constitution of the State of Arizona. That

determination is binding upon this Court as a final expression of the state's court of last resort on a matter of purely state law. Garner v. Louisiana, 368 U.S. 157 (1961). Thus, no matter what this Court may feel about the propriety of the practice of the Supreme Court of Arizona with respect to entertaining motions for rehearing, the ultimate decision of that court rested upon independent, separate grounds of purely state law.

Appellant asserts on page 2 of her jurisdictional statement that:

> "The state statute involved is a rule of the Supreme Court of Arizona granting rehearing on an original writ of Quo Warranto, enunciated for the first time in the judgment on rehearing of February 6, 1969, which rehearing was allowed in the absence of any

constitutional or statutory authority, or prior enunciated rule."

The granting by the Arizona Supreme Court of appellee's motion for rehearing did not enunciate a new rule of law for the first time. Rather, it was done pursuant to the "inherent power of the court to correct its judgments". (State ex rel. Nelson v. Jordan, supra, 450 P.2d at p. 384). The power of the Arizona Supreme Court to grant motions for rehearing in cases of original jurisdiction of petitions for extraordianry writs had been previously established in several other cases before that court. Bushnell v. Superior Court of Maricopa County, 102 Ariz. 309, 428 P.2d 987 (1967), on rehearing 102 Ariz. 465, 433 P.2d 15; State v. Superior Court of Mari-

copa County, 93 Ariz. 149, 379 P.2d 133 (1963), on rehearing 93 Ariz. 351, 380 P.2d 1009 (1963); Lane v. Mathews, 73 Ariz. 435, 242 P.2d 557 (1952), on rehearing 74 Ariz. 201, 245 P.2d 1025 (1952), on second rehearing 75 Ariz. 1, 251 P.2d 303 (1952). See also, Arizona Com.Min.Co. v. Iron Cap C. Co., 29 Ariz. 23, 239 Pac. 290 (1925).

It is really unquestioned, and hopefully unquestionable, that a court which renders a decision in the first instance should have and does have, either inherently, or most generally by Constitution, statute and/or court rule, the first right to review, reconsider, and revise, if necessary, that decision. The salutary effect of such a rule of law, both upon

the courts and the litigants, has been so obvious that there is a dearth of cases calling it into question or review.

The clearest explanation of the inherent power, prior to the case at bar, is found in Lindus v. Northern Insurance Company of New York, 103 Ariz. 160, 438 P.2d 311 (1968), and is clearly binding upon this Court, as the Arizona Court's interpretation of Arizona law. Garner v. Louisiana, supra.

> "It would be absurd to argue that a court, empowered to correct errors in every other court in this state cannot correct its own. Ariz. Const. Art. 6, Sec. 5, A.R.S. To hold otherwise would create the astounding concept that mistakes by the Supreme Court of Arizona are the only errors for which no relief is available." Lindus v. Northern Insurance Company of New York, supra, 103 Ariz. at p. 162, 438 P.2d at p. 313 (1968).

While a response to the point is not necessary, counsel here, as well as the dissenting justices, make much of the fact that the Arizona Attorney General's Office once urged the Arizona Court to adopt a contrary position on rehearing in State v. Bohannon, 101 Ariz. 520, 421 P.2d 877 (1967), appeal dismissed, 389 U.S. 1 (1967). (See appellant's jurisdictional statement, p. 22; State ex rel. Nelson v. Jordan, supra, 450 P.2d at p. 388 (1969)) So far as can be determined, only the legendary Perry Mason has been totally omniscient and never taken a position with which a court subsequently disagreed. This office makes no claim of infallibility. The position on rehearing urged by this office in Bohannon, supra, was not adopted

by the Arizona Supreme Court in that case. The Court there denied the motion for rehearing on the merits. The Court did not summarily dismiss the motion on jurisdictional grounds as urged by this office. This matter of Arizona pleading and practice is clearly well settled.

CONCLUSION

On any, or all, of the grounds urged in the Motion to Dismiss the Appeal in this cause, the appeal should be dismissed.

DATED this 5th day of August, 1969.

Respectfully submitted,

GARY K. NELSON
Attorney General of Arizona
Attorney for Appellee

CERTIFICATE OF SERVICE

I, GARY K. NELSON, attorney for the appellee herein and a member of the bar of this Court, do hereby certify that service was made on appellant herein by mailing three copies of the attached motion and brief, in accordance with Rule 33, Rules of the Supreme Court, 28 U.S.C., to:

R. G. Langmade
4802 East Van Buren Street
Phoenix, Arizona 85008

and

Stewart L. Udall
1169 Crest Lane
McLean, Virginia 22101

DATED this 15th day of August, 1969.

GARY K. NELSON

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

JORDAN *v.* ARIZONA EX REL. NELSON, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 204. Decided October 13, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.